CLERK'S COPY 3032

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 291

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT, AND JAMES GRASSIE, TRADING AS CARSON, PIRIE, SCOTT & CO., APPELLANTS,

vs.

THE CHICAGO TITLE AND TRUST COMPANY, TRUSTEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED AUGUST 10, 1900.

(17,576.)

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1899.

No. 698.

IN THE MATTER OF AUGUST FRANK, JOSEPH FRANK AND LOUIS FRANK, TRADING AS FRANK BROTHERS, *Bankrupts.*

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, TRADING AS CARSON, PIRIE, SCOTT & CO., *Appellants,*

vs.

THE CHICAGO TITLE AND TRUST COMPANY, TRUSTEE, *Appellee.*

MR. ZACH HOFHEIMER,
MR. A. J. PFLAUM,
MR. S. O. LEVINSON,
MR. HENRY ACH,
MR. J. M. ROTHCHILD,
Counsel for Appellants.

MR. ELI B. FELSENTHAL,
MR. MILTON J. FOREMAN,
MR. HERMAN FRANK,
Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

1 Pleas had at a regular term of the District Court of the Pleas.
United States of America, for the Northern Division of the Northern District of Illinois, begun and held in the United States Court Rooms, in the City of Chicago in said division of said district, on the third Monday of December, it being the 18th day thereof, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America, the one hundred and twenty-fourth year.

Present: The Honorable Christian C. Kohlsaat, Judge of the District Court of the United States, for the Northern District of Illinois, John C. Ames, United States Marshal for the Northern District of Illinois, and T. C. MacMillan, Clerk of said Court.

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In the matter of
No. 341 Frank Brothers,
Bankrupts.

Be it remembered that on to-wit: the 19th day of March, A. D. 1900, a Proof of Debt by Partnership of Carson, Pirie Scott & Co., filed in the office of Referee Frank L. Wean, on the 17th day of March, A. D. 1899, was filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, said Proof of Debt being in the words and figures following, to-wit:

2 PROOF OF DEBT BY PARTNERSHIP.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In the matter of
Frank Bros.,
Bankrupts. } In Bankruptcy.

At Chicago, in said Northern District of Illinois, on the 15th day of March, A. D. 1899, came James Grassie of Chicago, in the County of Cook, in said District of Illinois, and made oath and says that he is one of the firm of Carson, Pirie, Scott & Co., consisting of himself and Robert Scott, George Scott, John T. Pirie, Samuel C. Pirie, John E. Scott & Andrew McLeish of Chicago, in the County of Cook and State of Illinois; that the said Frank Brothers the persons against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of Thirty Hundred and Ninety-three Dollars and ninety-eight cents; that the consideration of said debt is as follows: for goods, wares and merchandise, sold and delivered to the said bankrupts at their special instance and request; that no part of said debt has been paid; that there are no set-offs or counterclaims to the same and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge

or belief, for their use, had or received any manner of security, for said debt whatever.

JAMES GRASSIE,
Creditor.

Subscribed and sworn to before me this 15th day of March, A. D. 1899.

JAMES E. GILLIS,
Notary Public.
(Official Character.)

(Seal.)

3 Endorsed: 262. No. 341. United States District Court, Northern District of Ill. In Bankruptcy. In the Matter of Frank Brothers, Bankrupt. Proof of Debt by Partnership. Of Carson Pirie Scott & Co. Amount of Debt $3093.98 Filed and allowed 2 P. M. Mar. 17th, 1899. Frank L. Wean, Referee. Filed in the Clerk's Office U. S. District Court, May 19, 1900, at 11:20 o'clock A. M. T. C. MacMillan, Clerk. Hofheimer & Pflaum, Attorneys.

4 And afterwards, to wit: on the 19th day of May, A. D. 1900, a Petition for Reconsideration of Claim of Carson Pirie Scott & Co., filed in the office of Referee Frank L. Wean on the 8th day of September, A. D. 1899, was filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, and Petition for Reconsideration being in the words and figures following, to-wit: Petition consid of cla May 1

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In the matter of	In Bankruptcy.
Frank Brothers,	No. 341.
Bankrupts,	

Chicago Title & Trust Company heretofore appointed trustee herein, hereby petitions this Honorable Court that the claim of Carson, Pirie, Scott & Company, heretofore filed herein and allowed, should be reconsidered and rejected in whole upon the ground that said Carson, Pirie, Scott & Company have within four months prior to the filing of the petition in bankruptcy herein received from the

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bankrupts large sums of money as preferences, which preferences they have not surrendered, and said trustee further prays that it, said trustee, recover from said Carson, Pirie, Scot & Co., the amount of the dividend heretofore received by said Carson, Pirie, Scott & Company on their said claim.

Dated, Chicago, August 31, 1899.

CHICAGO TITLE & TRUST COMPANY,
Trustee.

By FELSENTHAL, D'ANCONA & FOREMAN,
Its Attorneys.

Endorsed: In Bankruptcy. No. 341. U. S. District Court, Northern Dist. Ill. In the matter of Frank Brothers, Bankrupts. Petition for Reconsideration of Claim of Carson, Pirie, Scott & Co., Filed Sept. 8th, 2 P. M. 1899. Frank L. Wean, Referee. Felsenthal, D'Ancona & Foreman, Attorneys and Counselors, 108 LaSalle Street, Chicago. Filed in the Clerk's Office U. S. District Court, May 19, 1900, at 11:20 o'clock A. M. T. C. MacMillan, Clerk.

Car-
Scott
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5 And afterwards, to wit: on the 19th day of May, A. D. 1900, Answer of Carson, Pirie, Scott & Co., filed in the office of Referee Frank L. Wean, on the 3rd day of November, A. D. 1899, was filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, said Answer being in the words and figures following, to wit:

6 UNITED STATES OF AMERICA.

DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

In the matter of
Frank Bros.,
Bankrupts. } In Bankruptcy. No. 341.

Now come Carson, Pirie, Scott & Co., by Hofheimer & Pflaum, their attorneys, and in answer to the petition of the Chicago Title & Trust Co., Trustee heretofore filed herein, praying the court to reconsider and reject the claim of Carson, Pirie, Scott & Co., heretofore allowed against said bankrupts' estate, on the ground that they have within four (4) months prior to the filing of the petition in bankruptcy herein, received from the bankrupts, large sums of money as preferences, and answering say:

They admit that they have collected in the usual and ordinary course of their business, from said bankrupts, Frank Bros., within four (4) months prior to the filing of the petition in bankruptcy, the sum of One thousand three hundred and thirty-six and 79/100 Dollars ($1,336.79).

Further answering, Carson, Pirie, Scott & Co. say, that they did not know, or have reason to believe that the said Frank Bros., were insolvent, at the time the payments were made, nor did they have reasonable cause to believe that such payments were made with any intent to give them a preference, nor did said Frank Brothers intend the payments so made to be preferences.

Therefore the said Carson, Pirie, Scott & Co., deny the right of the said Chicago Title & Trust Co., Trustee to have said claim rejected and disallowed.

CARSON, PIRIE, SCOTT & CO.,
By HOFHEIMER & PFLAUM,
their Attys.

Endorsed: In Bankruptcy. No. 341, District Court of the U. S. For the Northern District of Ill. In the Matter of Frank Bros. Bankrupts. Answer of Carson Pirie Scott & Co. Filed Nov. 3rd, 10 A. M. 1899, Frank L. Wean, Referee. Hofheimer & Pflaum, Attorneys at Law. Unity Building, Chicago. Filed in the Clerk's Office U. S. District Court May 19, 1900, at 11:20 A. M. T. C. MacMillan, Clerk.

7 And afterwards, to-wit: on the 19th day of May, A. D. 1900, a Stipulation filed in the office of Referee Frank L. Wean on the 7th day of March, A. D. 1900, was filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, said Stipulation being in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois.

In the matter of
Frank Brothers,
Bankrupts. } In Bankruptcy No. 341.

Re application of the trustee for reconsideration and rejection of claim of Carson, Pirie, Scott & Company.

Carson, Pirie, Scott & Company and the Chicago Title & Trust Company, Trustee herein, by their respective attorneys, stipulate as follows:

That for a long time prior to the filing of the petition against the above named bankrupts, Carson, Pirie, Scott & Company had various dealings with said bankrupt firm—said dealings consisting of the sale by said Carson Pirie Scott & Company, to said Frank Brothers, of goods, wares and merchandise. That annexed hereto, marked Exhibit "A", is an itemized account showing in detail correctly, the sales of such goods, wares and merchandise, by said Carson, Pirie, Scott & Company to said Frank Brothers, and the credits consisting of payments in cash by said Frank Brothers to said Carson, Pirie, Scott & Co., and return of merchandise by the former to the latter for a period of four months prior to the filing of the petition herein. Said account also shows in detail the dates of the respective items of debits and credits for said period of four months.

It is further stipulated that during all the times the above transaction took place, said Frank Brothers were wholly and hopelessly insolvent to the knowledge of said Frank Brothers, and at that
8 the time of their adjudication in bankruptcy their assets did not exceed the sum of $125,000 while their liabilities exceeded $500,000.00.

And it is stipulated that at the time of the various transactions set forth in Exhibit "A" neither said Carson, Pirie, Scott & Company nor any of their agents had knowledge of the insolvency of said Frank Brothers or had reasonable cause to believe that said Frank Brothers were insolvent, or that when the payments in said schedule set forth were made by said Frank Brothers to said Carson, Pirie, Scott & Company, said Carson, Pirie, Scott & Company had reasonable cause to believe that it was intended thereby to give preferences.

It is further stipulated that the payments referred to in said schedule "A" were made in the regular course of business.

It is further stipulated that said Carson Pirie Scott & Co. having previously filed their claim against said bankrupt estate, said claim was allowed and a first dividend paid thereon to said Carson, Pirie, Scott & Company, but that when said claim was presented, and at the time of the payment of dividend the trustee herein was ignorant of the fact of the payments and credits shown on Exhibit "A" and did not discover the same until after the dividend had been paid to said Carson, Pirie, Scott & Company.

It is further stipulated that the testimony of August Frank taken on the hearing of the objections of the said trustee to the claim of the First National Bank against said Frank Brothers, before Frank L. Wean, Esq., Referee, on June 1st, 1899, so far as the same show the condition of the affairs of said Frank Brothers, at the time testified to, and the payments made by said firm at said times, shall be considered as testimony in this case to the same force and effect as if said August Frank were duly sworn as a witness and testified in this proceeding and that his testimony shall be considered in arriving at a decision of the question herein involved.

It is further stipulated that the questions to be decided by the Referee herein is whether payments made by bankrupts within four months prior to their adjudication of bankruptcy, in the usual course of business constitute preferences, whether the person receiving such payments was aware of the insolvency of said bankrupts or not, or had reasonable cause or not to believe that by reason of said payments a preference was intended, and whether if such payments do constitute preferences on the state of facts above presented, the said claim of Carson, Pirie, Scott & Company shall be reconsidered and rejected unless said claimants shall first surrender the amount of such preferences.

HOFHEIMER & PFLAUM,
Attys. for Carson, Pirie, Scott & Co.
FELSENTHAL, D'ANCONA & FOREMAN,
Attys. for Trustee Chicago Title & Trust Co.

Chicago, Nov. 3, 1899.

Frank Bros., Chicago.

In Account with Carson Pirie Scott & Co.

Adams and Franklin Streets.

Statement showing all debits and credits within 4 months of the filing of petition in bankruptcy.

1898.		Dr.	Net Cash. No Discount. A	1 per cent. 10 days. Net 30 days. B	2 per cent 10 days. 1 per cent, 30 days. C-D	2 per cent. 10 days. 1 per cent. 30 days. Net 60 days. E	4 per cent. 10 days. 3 per cent. 30 days. 2 per cent. 60 days. F	6 per cent. 10 days. 5 per cent. 30 days. 4 per cent. 60 days. G.
Sept. 12	To Mdse.					33.83		
						20.00		
15			17.75			59.25		
						4.50		
17			47.22		26.00	82.25		
						7.00		
19						21.00		
22				82.95				
23				14.10		41.86		12.50
				38.55		47.38		
26						12.39		
27				18.60		.67		
						11.08		
28			17.60					
30				2.81	16.50	1.26		
Oct. 1				68.35				5.55
4						78.90		
6						6.84		
7			5.25	102.20		51.83		52.95
			12.10					
8						5.30		
11						8.75		
						2.63		
12				3.13		10.60		
				1.88				
14				15.10		10.50		32.00
15				155.85				12.60
17						49.80		18.75
						21.70		
18				6.40	79	4.90		7.00
20						7.00		
						2.63		
21						39.08		33.79
22			147.79					
25						19.75		6.75
26						21.00		3.33
				163.25		223.25		25.47
				284.10				4.80
27						6.75		1.60
						3.75		
31				18.30		86.87		8.44
Nov. 1						2.09		
2						4.50		
						11.38		
3				6.80		7.78		
4				45.88		38.46		
5				32.78		8.50		9.00
						27.56		
7				21.85		13.00		
8						58.97		
						6.45		
						10.15		
10				16.20				
11				40.50				55.98
14				80.55				
15						11.25		
						20		
						151.65		
						34.85		
16						19.78		
17						189.90		65.58
18				16.88				21.90
				16.25				
				104.10				
19						157.17		
22				3.60				2.50
				6.80				
23						99.[illegible]		

CREDITS.

Nov. 3	cash 858.20					
Dec. 10	" 302.91					
19	" 175.68			Total cash payments.		1,336.79
			6.30			
Oct. 25	Mdse		2.65			
Nov. 7	"				9.00	
8	"			3.75		
21	"			22.25	2.5	
30	"	6.80		157.17		
				44.98		
				16.25		
Dec. 1				7.64		
				55.85	18.00	
5						
6		26.22				
		33.02	8.95	307.89	29.50	
					Mdse Returns,	379.36
					Total Credits,	1,716.15

Endorsed: In Bankruptcy. No. 341. U. S. District Court, Northern District Ill. In the matter of Frank Brothers, Bankrupts. Re claim of Carson Pirie Scott & Co., Stipulation. Filed March 7th, 10 A. M. 1900. Frank L. Wean, Referee. Filed in the Clerk's Office U. S. District Court, May 19, 1900, at 11.20 o'clock A. M. T. C. MacMillan, Clerk. Felsenthal, D'Ancona & Foreman, Attorneys & Counselors, 108 LaSalle Street, Chicago.

10 And afterwards, to-wit: on the 19th day of May, 1900, there was filed in the Clerk's office of said District Court, the Order of Referee, reconsidering and rejecting claim of Carson Pirie Scott & Co., said Order of Referee being in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

In the matter of August Frank, Joseph Frank and Louis Frank, Trading as Frank Brothers, Bankrupts. } In Bankruptcy. No. 341.

At Chicago, in the County of Cook in the State of Illinois, and in said District, on this 2nd day of April, 1900 before me, Frank L. Wean, Referee in Bankruptcy.

Chicago Title & Trust Company, Trustee herein, having heretofore filed its petition praying that the claim of Carson, Pirie, Scott & Company against said estate heretofore allowed herein, be reconsidered and rejected, and that said Carson, Pirie, Scott & Company be ordered and required to repay to the Trustee the amount of the dividend on said claim heretofore paid to said Carson, Pirie, Scott & Company by said Trustee pursuant to an order of this court, the grounds of said petition being that said Carson, Pirie, Scott & Company had within four (4) months prior to the adjudication in bankruptcy of the bankrupts herein received large sums of money as preferences, which preferences it had not surrendered and said Carson, Pirie, Scott & Company having duly appeared herein by their Counsel, and answered said petition and admitted in said answer that they had collected in the usual and ordinary course of their business from said bankrupts within four (4) months prior to the adjudication in bankruptcy of the bankrupts herein, the sum of $1,336.79 and further alleging in their said answer, that they, said Carson, Pirie, Scott & Company did not know and did not have reason to believe that the said Frank Brothers were insolvent
11 at the time said payments were made, and they did not have reasonable cause to believe that said payments were made with intent to give them preference, and that the said bankrupts did not intend the payments so made to be preferences; and the issues raised by said petition and answer having duly come on for hearing and trial before me, such Referee in Bankruptcy and the parties stipulating as to the material facts herein, and testimony having been heard by me, being fully advised in the matter I hereby find the following facts:

First: That the above named August Frank, Joseph Frank and Louis Frank were duly adjudicated bankrupts on the 11th day of February, 1899.

Second: That for a long time prior thereto, said Carson, Pirie, Scott & Company had carried on dealings with said Bankrupt firm—said dealings consisting of the sale by said Carson, Pirie, Scott & Company to said Frank Brothers of goods, wares and merchandise amounting to the total sum of $4403.77.

Third. That said Carson, Pirie, Scott & Company in the regular and ordinary course of business, and within four (4) months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts, as partial payment of said account for such goods, wares and merchandise so sold and delivered to said Frank Brothers, the sum of $1336.79 leaving balance due, owing and unpaid amounting to $3093.98.

Fourth. That at the time this payment was made said Frank Brothers were wholly and hopelessly insolvent to the knowledge of said Frank Brothers, and that when said payments were made and at the time of the adjudication in bankruptcy of the bankrupts herein, the assests of said bankrupts did not exceed the sum of $125,000, while their liabilities exceeded $500,000.

12 Fifth. That at the time of the payment above set forth, neither said Carson, Pirie, Scott & Company, nor any of their agents, had knowledge of the insolvency of said Frank Brothers, or had reasonable cause to believe that said Frank Brothers were insolvent, and that when said payment was made, said Carson, Pirie, Scott & Company did not have reasonable cause to believe that said bankrupts by said payment intended thereby to give a preference.

Sixth. That at or about the time of the first meeting of the creditors herein, to-wit, on March 15, 1899, said Carson, Pirie, Scott & Company duly filed a claim herein against said bankrupts' estate for their said balance of said claim for goods, wares and merchandise sold by them to the bankrupts, as aforesaid—said balance of said claim amounting to the sum of $3093.98, and that, at or about the time of the said first meeting of creditors herein, said claim was duly allowed at the sum last above set forth; that thereafter and on the 28th day of April, 1899, a dividend of 15% upon all claims which were allowed against said bankrupts' estate was duly declared by the referee herein, and that said dividend was paid to the various creditors who had proved their claims, including said Carson, Pirie, Scott & Company; that the amount of the dividend paid to said Carson, Pirie, Scott & Company was $464.10 which money said Carson, Pirie, Scott & Company still retain, no part thereof having been repaid or returned to the trustee herein, or anybody acting on behalf of said trustee.

That at the time of the allowance of said claim and the declaration of said dividend and the payment thereof, the trustee was not aware of the fact that said Carson, Pirie, Scott & Company had received any preference on their claim, and demand against said bankrupts.

13 That said Carson, Pirie, Scott & Company have refused to surrender to the trustee the amount of the payment made to them by said bankrupts above set forth as a condition of the allowance of their said claim, and have by their counsel declared that it is the intention of said claimant to retain the full amount of said payment so made to them by said bankrupt, and not to surrender the same.

That at the hearing herein it was expressly stated that the questions to be passed upon were:

First: Whether payments made to creditors by bankrupts within four months prior to their adjudication of bankruptcy, which said payments are made in the regular and ordinary course of business, constitute preferences, whether or not the creditors receiving such payments were aware of the insolvency of said bankrupts or not, or had reasonable cause to believe that by reason of such payments a preference was intended.

Second: Whether in this proceeding the Court has the power and authority to order, require and compel said claimant to repay to the Trustee the amount of the dividend received by said claimants.

I therefore find as matters of law that by reason of such payments made by said bankrupts to said Carson, Pirie, Scott & Company within four (4) months prior to the adjudication in bankruptcy of said bankrupts, said Frank Brothers gave a preference to said Carson, Pirie, Scott & Company and said Carson, Pirie, Scott & Company did receive a preference from said bankrupts in that said bankrupts did within said time make a transfer af their property to said Carson, Pirie, Scott & Company, and the effect of said transfer was

14 that Carson, Pirie, Scott & Company, did obtain a greater percentage of the debt due to them by said bankrupts than any other creditors of said bankrupts of the same class.

And it is therefore ordered, adjudged and decreed:

First: That the claim of said Carson, Pirie, Scott & Company heretofore filed herein and allowed should be reconsidered.

Second: That said claim of said Carson, Pirie, Scott & Company should be rejected and expunged.

Third: That this Court in this proceeding has the power and authority to order, require and compel said claimant to repay to the said Trustee the amount of the dividend received by said claimant.

Fourth: That the said Carson, Pirie, Scott & Company shall

pay to the Trustee herein the amount of the dividend heretofore paid to them by the Trustee herein, to-wit, the sum of $464.10.

FRANK L. WEAN,
Referee in Bankruptcy.

O. K. as to form,
FELSENTHAL, D'ANCONA & FOREMAN,
Attys. for Trustee.

O. K. as to form
HOFHEIMER & PFLAUM,
Attys. for Carson, Pirie, Scott & Co.

15 Endorsed: In Bankruptcy, No. 341, U. S District Court, Northern Dist. of Illinois. In the Matter of Frank Brothers, Bankrupts. Order of Referee reconsidering and rejecting claim of Carson Pirie Scott & Co., and ordering repayment of Dividend. Filed in the Clerk's office U. S. District Court, May 19, 1900, At 11:20 o'clock A. M. T. C. MacMillan, Clerk. Felsenthal, D'Ancona & Foreman, Attorneys and Counselors, 103 LaSalle Street, Chicago.

And afterwards, to-wit: on the 19th day of May, A. D. 1900, a Petition for Certificate filed in the office of Referee Frank L. Wean on the 4th day of April, A. D. 1900, was filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, said Petition for Certificate being in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

16 For the Northern District of Illinois.

In the matter of August Frank, Joseph Frank and Louis Frank, Trading as Frank Brothers, Bankrupts.	In Bankrupty No. 341.

And now comes Carson, Pirie, Scott & Company and presents its petition to the Honorable Frank L. Wean, Referee herein, for a review by the Judge of the District Court of the order entered herein by said Referee on the 2nd day of April, 1900, rejecting and expunging the claim of Carson, Pirie, Scott & Company heretofore filed herein and requiring said Carson, Pirie, Scott & Company to

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pay to the Trustee herein the amount of the dividend heretofore paid to said Carson, Pirie, Scott & Company by the Trustee herein, to-wit: the sum of four hundred sixty-four dollars and ten cents ($464.10) upon the ground that said Referee has committed error:

First. In holding that the payment by Frank Brothers to the said Carson, Pirie, Scott & Company of the sum of Thirteen Hundred and Thirty-six Dollars and Seventy-nine cents ($1336.79) within four (4) months prior to the date of the adjudication in bankruptcy herein, constitutes a preference in as much as said Referee finds that said Carson, Pirie, Scott & Company did not have any knowledge at the time of said payment of the insolvency of said Frank Brothers, and had no reasonable cause to believe that said Frank Brothers were insolvent, and had no reasonable cause to believe that said bankrupts by said payment intended to give a preference.

Second. In that said Referee holds that this Court has the power and authority to order, require and compel said petitioner to repay to the Trustee the amount of the dividend received by said claimant.

17 Third. In that said claimant is ordered and required to repay to the Trustee herein the amount of the dividend heretofore paid to said claimant by the Trustee herein, to-wit: the sum of Four Hundred Sixty-four Dollars and Ten cents $464.10).

CARSON, PIRIE, SCOTT & CO.,
Petitioner.
By HOFHEIMER & PFLAUM,
Attorneys.

Endorsed: 341. United States District Court. In the Matter of Frank Bros., Bankrupts. In re Claim of Carson Pirie Scott & Co., Petition for Certificate. Filed April 4th, 3:40 P. M. 1900. Frank L. Wean, Referee. Filed in the Clerk's Office U. S. District Court May 19, 1900, at 11:20 o'clock A. M. T. C. MacMillan, Clerk. Hofheimer & Pflaum, Attorneys at Law, Unity Building, Chicago.

18 And afterwards, to-wit: on the 10th day of May, A. D. 1900, there was filed in the Clerk's office of said District Court, Certificate of Referee, the same being in the words and figures following, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

In the matter of
August Frank, Joseph Frank, and
Louis Frank, trading as Frank
Brothers,
Bankrupts. } In Bankruptcy #341.

At the City of Chicago, in the County of Cook and State of Illinois, in said District, on the 4th day of April, 1900 before me Frank L. Wean, one of the Referees in Bankruptcy of said Court.

I, Frank L. Wean, Referee of said Court in Bankruptcy do hereby certify that in the course of the proceedings in said cause before me the following questions arose pertinent to said proceedings, to-wit.

First. Whether upon the following facts the claim of Carson, Pirie, Scott & Company heretofore filed and allowed herein should be reconsidered, expunged and rejected.

Second. Whether said Carson, Pirie, Scott & Company did receive a preference from said bankrupts without a surrender of which preference said claim should be disallowed.

Third. Whether said Carson, Pirie, Scott & Company should be ordered and required by this Court in this proceeding to repay to the Trustee the amount of the dividend heretofore received by said Carson, Pirie, Scott & Company.

The evidence and admissions of the parties hereto establish the following facts:

First: That the above named August Frank, Joseph Frank
19 and Louis Frank were duly adjudicated bankrupts on the 11th day of February, 1899.

Second. That for a long time prior thereto, said Carson, Pirie, Scott & Company had carried on dealings with said bankrupt firm—said dealings consisting of the sale by said Carson, Pirie, Scott & Company to said Frank Brothers of goods, wares and merchandise amounting to the total sum of $4403.77.

Third: That said Carson, Pirie, Scott & Company in the regular and ordinary course of business, and within four months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares and merchandise so sold and delivered to said Frank Brothers the sum of $1336.79 leaving balance due, owing and unpaid amounting to $3093.98.

Fourth: That at the time this payment was made, said Frank Brothers were wholly and hopelessly insolvent to the knowledge of said Frank Brothers and that when said payments were made and at the time of the adjudication in bankruptcy of the bankrupts herein, the assets of said bankrupts did not exceed the sum of $125,000, while their liabilities exceeded $500,000.

Fifth. That at the time of the payment above set forth, neither said Carson, Pirie, Scott & Company nor any of their agents had knowedge of the insolvency of said Frank Brothers, or had reasonable cause to believe that said Frank Brothers were insolvent and that when said payment was made, said Carson, Pirie, Scott & Company did not have reasonable cause to believe that said Bankrupts by said payment intended thereby to give a preference.

Sixth. That at or about the time of the first meeting of the creditors herein, to-wit, on the 15th day of March 1899, said Carson, Pirie, Scott & Company duly filed a claim herein against said bankrupts' estate for their said balance of said claim, for goods, wares and merchandise sold by them to the bankrupts, as aforesaid—said balance of said claim amounting to the sum of $3093.98 and that at or about the time of the said first meeting of creditors herein said claim was duly allowed at the sum last above set forth; that thereafter and on the 28th day of April 1899, a dividend of 15% upon all claims which were allowed against the said bankrupts' estate was duly declared by the Referee herein, and that said dividend was paid to the various creditors who had proved their claims including said Carson, Pirie, Scott & Company; that the amount of the dividend paid to said Carson, Pirie, Scott & Company was $464.10, which money said Carson, Pirie, Scott & Company still retain, no part thereof having been repaid or returned to the trustee herein, or anybody acting on behalf of said Trustee.

That at the time of the allowance of said claim and the declaration of said dividend and the payment thereof, the Trustee was not aware of the fact that said Carson, Pirie, Scott & Company had received any preference on their claim and demand against said bankrupts.

That said Carson, Pirie, Scott & Company have refused to surrender to the Trustee the amount of the payment made to them by said bankrupts above set forth as a condition of the allowance of their said claim, and have by their counsel declared that it is the intention of the said claimant to retain the full amount of said payment so made to them by said bankrupts and not to surrender the same.

That at the hearing herein, it was expressly stated that the questions to be passed upon herein were:

First: Whether payments made to creditors by bankrupts within four (4) months prior to their adjudication in bank-
21 ruptcy, which said payments are made in the regular and ordinary course of business constitute preferences, whether or not the creditors receiving such payments were aware of the insolvency of said bankrupts or not, or had reasonable cause to believe that by reason of such payments a preference was intended.

Second. Whether in this proceeding, the Court has the power and authority to order, require and compel said claimant to repay to the Trustee the amount of the dividend received by said claimants.

My conclusions of law upon the foregoing facts are that by reason of such payments made by said bankrupts to said Carson, Pirie, Scott & Company within four (4) months prior to the adjudication in bankruptcy of said bankrupts, said Frank Brothers gave a preference to said Carson, Pirie Scott & Company, and said Carson, Pirie,Scott & Company did receive a preference from said bankrupts in that said bankrupts did within said time make a transfer of their property to said Carson, Pirie, Scott & Company, and the effect of said transfer was that said Carson, Pirie, Scott & Company did obtain a greater percentage of the debt due to them by said bankrupts than other creditors of said bankrupts of the same class.

And I have therefore made the following order herein:

First: That the claim of said Carson, Pirie, Scott & Company heretofore filed herein and allowed, should be reconsidered.

Second: That said claim of said Carson, Pirie, Scott & Company should be rejected and expunged.

Third: That this Court in this proceeding has the power and authority to order, require and compel said claimant to repay to the Trustee the amount of the dividend received by said claimant.

Fourth: That said Carson Pirie, Scott & Company shall pay to the Trustee herein the amount of the dividend heretofore paid to them by the Trustee herein, to-wit, the sum of $464.10.

And the said questions are certified to the Judge for his opinion thereon.

FRANK L. WEAN,
Referee in Bankruptcy.

Chicago, April 4th, 1900.

22 Endorsed: 341. United States District Court. In re Frank Bros., Bankrupts. Certificate of Referee. Filed May 10, 1900, at 10 o'clock A. M. T. C. MacMillan, Clerk.

ree 23 And afterwards, to-wit: on the 9th day of May, A. D. 1900, the following order was had and entered in said cause, before the Honorable Christian C. Kohlsaat, Judge, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois.

In the matter of August Frank Joseph Frank and Louis Frank trading as Frank Brothers Bankrupts	In Bankruptcy No. 341

This cause this day coming on to be heard on the report and certificate of Honorable Frank L. Wean, Referee, in the matter of the application of Chicago Title & Trust Company, Trustee herein, to reconsider and reject the claim of Carson, Pirie, Scott & Company heretofore filed herein, and require said Carson, Pirie, Scott & Company to repay to the trustee the amount of the dividend received by Carson, Pirie, Scott & Company, and upon the exceptions to said report heretofore filed herein by said Carson, Pirie, Scott & Company and due deliberation thereon being had, it is ordered that said Referee's report be and the same is hereby in all respects confirmed. And the court hereby finds the following facts:

First. That the above named August Frank, Joseph Frank and Louis Frank were duly adjudicated bankrupts on the 11th day of February, 1899.

Second. That for a long time prior thereto, said Carson, Pirie, Scott & Company had carried on dealings with said bankrupt firm—said dealings consisting of the sale by said Carson, Pirie, Scott & Company to said Frank Brothers of goods, wares and merchandise amounting to the total sum of $4403.77.

Third. That said Carson, Pirie, Scott & Company in the regular and ordinary course of business and within four (4) months
24 prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares and merchandise so sold and delivered to said Frank Brothers, the sum of $1336.79 leaving balance due, owing and unpaid amounting to $3093.98.

Fourth. That at the time this payment was made, said Frank Brothers were wholly and hopelessly insolvent to the knowledge of said Frank Brothers, and that when said payments were made and that at the time of said adjudication in bankruptcy of the bankrupts

herein, the assets of said bankrupts did not exceed the sum of $125,- Or
000, while their liabilities exceeded $500,000.

Fifth. That at the time of the payment above set forth, neither Carson, Pirie, Scott & Company, nor any of their agents had knowledge of the insolvency of said Frank Brothers, or had reasonable cause to believe that said Frank Brothers were insolvent, and that when said payment was made, said Carson, Pirie, Scott & Company did not have reasonable cause to believe that said bankrupts by said payment intended thereby to give a preference.

Sixth. That at or about the time of the first meeting of the creditors herein, to-wit, on March 17th, 1899 said Carson, Pirie, Scott & Company duly filed a claim herein against said bankrupts' estate for their said balance of said claim for goods, wares and merchandise sold by them to the bankrupts, as aforesaid—said balance of said claim amounting to the sum of $3093.98, and that at or about the time of the said first meeting of creditors herein, said claim was duly allowed at the sum last above set forth; that thereafter on the 28th day of April, 1899 a dividend of 15% upon all claims which were allowed against said bankrupts' estate was duly
25 declared by the referee herein, and that said dividend was paid to the various creditors who had proved their claims, including said Carson, Pirie, Scott & Company; that the amount of the dividend paid to said Carson, Pirie, Scott & Company was $464.10 which money said Carson, Pirie, Scott & Company still retain, no part thereof having been repaid, or returned to the trustee herein or anybody acting on behalf of said Trustee.

Seventh. That at the time of the allowance of said claim and the declaration of said dividend and the payment thereof, the trustee was not aware of the fact that said Carson, Pirie, Scott & Company, had received any preference on their claim and demand against said bankrupts.

Eighth. That said Carson, Pirie, Scott & Co., have refused to surrender to the trustee the amount of the payment made to them by said bankrupts above set forth as a condition of the allowance of their said claim and have by their counsel declared that it is the intention of said claimant to retain the full amount of said payment so made to them by said bankrupts and not to surrender the same.

And the court therefore finds as matters of law that by reason of such payments made by said bankrupts to said Carson, Pirie, Scott & Company within four months prior to the adjudication in bankruptcy of said bankrupts, said Frank Brothers gave a preference to said Carson, Pirie, Scott, & Company, and said Carson, Pirie, Scott & Company did receive a preference from said bankrupts in that said bankrupts did within said time make a transfer of their prop-

erty to said Carson, Pirie, Scott & Company and the effect of said transfer was that said Carson, Pirie, Scott & Company did obtain a greater percentage of the debt due to them by said bankrupts,
26 than any other of the creditors of said bankrupts of the same class.

It is therefore ordered adjudged and decreed that said claim of said Carson, Pirie, Scott & Company heretofore filed herein and allowed should be reconsidered.

That said claim of Carson, Pirie, Scott & Company should be rejected and expunged.

That said Carson, Pirie, Scott & Company forthwith pay to the Trustee herein the amount of the dividend heretofore paid to them by the Trustee herein to-wit, the sum of $464.10.

To the entry of which order and each and every part thereof the said Carson, Pirie, Scott & Company by their counsel object and except.

And afterwards, to-wit: on the 9th day of May, A. D. 1900, the following order was had and entered of record in said cause before the Hon. Christian C. Kohlsaat, Judge, to-wit:

In re
341 Frank Brothers,
Bankrupts.

And now comes Carson, Pirie, Scott & Co., by its attorneys, Hofheimer & Pflaum, and pray an appeal from the order and decree of the court entered herein on the 9th day of May, A. D. 1900, reconsidering and expunging the claim of Carson, Pirie Scott & Co., and ordering it to repay the amount of dividend on said claim to the Trustee in said cause, to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, which is allowed upon appellant giving bond in the penal sum of $250.00 to be filed within ten days from this date.

26½ And afterwards to-wit, on the 11th day of May, A. D. 1900, the bond on appeal was filed in said court, said bond being in the words and figures following, to-wit : App Ma

Know All Men by These Presents, that we, John T. Pirie, Robert Scott, George Scott, Samuel C. Pirie, John E. Scott, Andrew McLeish, and James Grassie, copartners doing business under the firm name of Carson, Pirie, Scott & Co., as principals and Charles B. Miller as surety, are held and firmly bound unto Chicago Title & Trust Company, Trustee of August Frank, Joseph Frank and Louis Frank, trading as Frank Bros., bankrupts, in the penal sum of Two hundred and fifty dollars ($250.00) to be paid to the said Chicago Title & Trust Company, Trustee, which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this Eleventh day of May, in the year of our Lord, one thousand nine hundred.

Whereas, lately in the District Court of the United States of America, for the Northern District of Illinois, in Bankruptcy, in the matter of Frank Brothers, bankrupts, said Carson, Pirie, Scott & Co., proved their claim against said bankrupts' estate for the sum of Three thousand and ninety-three and 98/100 Dollars $3,093.98) which said claim was allowed and in which said proceeding the said Carson, Pirie, Scott & Co. had collected a dividend on their said claim, amounting to the sum of Four hundred and sixty-four and 10/100 dollars ($464.10) ; and

Whereas, a certain Order and decree was rendered in said District court of the United States for the Northern District of Illinois, on the 9th day of May, 1900 against said Carson, Pirie, Scott & Co., ordering and adjudging that their said claim heretofore allowed, be reconsidered and rejected and the said Carson, Pirie, Scott & Co., having been ordered and decreed to pay to the Chicago Title & Trust Co., Trustee, the sum of Four hundred and sixty-four and 10/100 Dollars ($464.10) and

Whereas, the said Carson, Pirie, Scott & Co. have prayed and been allowed an appeal from said Order and Decree of said District Court of the United States in and for the Northern District of Illinois, and a citation has been issued directed to the Chicago Title & Trust Co., Trustee, citing and admonishing it to be and appear at the United States Circuit Court of Appeals, for the Seventh Circuit, to be holden in Chicago, within thirty (30) days from the date hereof.

Now then, the condition of the above obligation is such that if

filed the said John T. Pirie, Robert Scott, George Scott, Samuel C. Pirie, John E. Scott, Andrew McLeish and James Grassie, co-partners as Carson, Pirie, Scott & Co. shall prosecute said appeal to effect and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void, otherwise to remain in full force and virtue.

JOHN T. PIRIE, [Seal]
ROBERT SCOTT, [Seal]
GEORGE SCOTT, [Seal]
SAMUEL C. PIRIE, [Seal]
ANDREW McLEISH, [Seal]
per John E. Scott, one of the firm.
JOHN E. SCOTT, [Seal]
JAMES GRASSIE, [Seal]
CHARLES B. MILLER, [Seal]

O. K.
FELSENTHAL & FOREMAN,
Attys. for Trustee.
Approved May 11, 1900.
KOHLSAAT J.

Endorsed: #341 U. S. District Court. In re Frank Bros. re Claim of Carson, Pirie, Scott & Co. Bond. Filed May 11, 1900 at 3 o'clock P. M.

T. C. MacMILLAN, Clerk.

27 And afterwards, to-wit: on the 16th day of May, A. D. 1900, there was filed in the Clerk's office of said District Court an Assignment of Errors, the same being in the words and figures following, to-wit:

United States of America,
Northern District of Illinois, } ss.

IN THE DISTRICT COURT OF THE UNITED STATES.

In and for said District.

In the matter of the estate of Frank Bros. Bankrupts. Chicago Title & Trust Company, Trustee.

In the matter of the proceedings of the Chicago Title & Trust Co. Trustee, against John T. Pirie, et al.

Now on this ninth day of May, A. D. 1900, come said John T. Pirie, George Scott, Robert Scott, Andrew McLeish, Samuel C. Pirie, John E. Scott and James Grassie, as copartners, trading under the firm name of Carson, Pirie, Scott & Co., by Zach Hofheimer and A. J. Pflaum their attorneys and say that in the record and proceedings aforesaid, there is manifest error, and hereby assign the following errors upon the record in this cause.

1. The District Court erred in approving the report of the Referee herein upon the petition of the Chicago Title & Trust Company, Trustee of said bankrupts, for the reconsideration and disallowance of the claim of Carson, Pirie, Scott & Co., creditors of said bankrupts.

2. The District Court erred in ordering that the claim of said Carson, Pirie, Scott & Co. be disallowed and expunged.

3. The District Court erred in ordering that the claim of Carson, Pirie, Scott & Co. should not be allowed as a claim against said bankrupt estate, unless said Carson, Pirie, Scott & Co. should first pay to said Trustee all moneys received or collected by said Carson, Pirie, Scott & Co. from said bankrupts in the ordinary course
28 of business and within four months preceding the time of the filing of the petition in bankruptcy herein.

4. The District Court erred in holding that all or any moneys received or collected by said Carson, Pirie, Scott & Co. from said bankrupts within four months preceding the time of the filing of the petition in bankruptcy herein, in the regular course of business, and without any knowledge, or reasonable cause to believe on the part of said Carson, Pirie, Scott & Co. that said bankrupts were insolvent, or without intending thereby to give a preference to said

Carson, Pirie, Scott & Co. were, and such payments and receipts of money and each of them, by said Carson, Pirie, Scott & Co. constituted preferences within the meaning of the bankrupt law.

5. The District Court erred in holding that under sub-paragraph G of Section 57 of the Act on Bankruptcy, said Carson, Pirie, Scott & Co. was compelled to first surrender and pay over to said Trustee all moneys which said Carson, Pirie, Scott & Co. had received from said bankrupts, in the regular course of business, and without any knowledge on the part of said Carson, Pirie, Scott & Co. or reasonable cause to believe that said bankrupts were insolvent at the time of such payments, or any of them, or that said bankrupts intended by reason of such payments or any of them, to give said Carson, Pirie, Scott & Co. a preference, before the claim of said Carson, Pirie, Scott & Co. would be allowed as a claim against said bankrupt estate.

29 6. The District Court erred in ordering said Carson, Pirie, Scott & Co. to repay to said Trustee the dividend theretofore received by them and regularly allowed to said Carson, Pirie, Scott & Co. in due course of administration by said District Court.

Wherefore said claimants as copartners as aforesaid, and each of them, pray that the order, judgment and decree aforesaid, may be in all respects reversed.

ZACH HOFHEIMER,
A. J. PFLAUM,
Attorneys for said
JOHN T. PIRIE, et al.

Endorsed: 341. U. S. District Court. In re Frank Bros. re Claim of Carson, Pirie, Scott & Co., Assignment of Errors. Filed May 16th, 1900. T. C. MacMillan, Clerk. Hofheimer & Pflaum, Attorneys at Law, Unity Building, Chicago.

30 And afterwards, to-wit: on the 16th day of May, A. D. 1900, a Præcipe was filed in the Clerk's office of said District Court, said Præcipe being in the words and figures following, to-wit:

United States of America,
Northern District of Illinois.

IN THE DISTRICT COURT

For the Northern District of Illinois.

In the Matter of
Frank Brothers, Bankrupts,
in re claim of Carson, Pirie,
Scott & Co.

To T. C. McMillen, Clerk of said Court:

You will please prepare transcript of record in the above entitled cause, showing proof and allowance of claim of Carson, Pirie, Scott & Co.

Petition of the Chicago Title & Trust Co., Trustee, for the reconsideration and disallowance of the claim of Carson, Pirie, Scott & Co.

Answer of Carson, Pirie, Scott & Co. to the petition of the Chicago Title & Trust Co., Trustee.

Stipulation of facts and evidence on hearing of the petition of the Chicago Title & Trust Co., before Frank L. Wean, Referee.

Order of Frank L. Wean Referee on petition of Chicago Title & Trust Co., to reconsider and disallow claim of Carson, Pirie, Scott & Co.

Petition of Carson, Pirie, Scott & Co. for the certificate of Frank L. Wean, Referee certifying the questions involved in said petition to the District Court of the United States.

Certificate of Frank L. Wean, Referee to the District Court of the United States.

Order and decree of the District Court of the United States
31 on certificate of Frank L. Wean, Referee.

Assignment of Errors of Carson, Pirie, Scott & Co.

HOFHEIMER & PFLAUM,
Attorneys for Carson, Pirie, Scott & Co.

Endorsed: 341. U. S. District Court. In re Frank Bros. re Claim of Carson, Pirie, Scott & Co., Præcipe. Filed May 16th, 1900. T. C. MacMillan, Clerk. Hofheimer & Pflaum. Attorneys at Law. Unity Building, Chicago.

Northern District of Illinois, }
Northern Division. }

I, T. C. MacMillan, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of the proceedings had in the above entitled cause prepared in accordance with the præcipe of the attorneys for the appellants filed in said Court on the 16th day of May, A. D. 1900, as the same appears from the records and files of said Court now remaining in my custody and control.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District this 23rd day of May, A. D. 1900.

(Seal) T. C. MacMILLAN,
Clerk.

United States of America } ss.

The President of the United States, to Chicago Title and Trust Company, Trustee in Bankruptcy of August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to an appeal which has been allowed by the District Court of the United States for the Northern District of Illinois from its final decree in the matter of August Frank, Joseph Frank and Louis Frank trading as Frank Brothers, in Bankruptcy wherein John T. Pirie, Robert Scott, George Scott, Andrew McLeisch, Samuel C. Pirie, John E. Scott and James Grassie trading as Carson, Pirie, Scott & Co., are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat Judge of the District Court of the United States for the Northern District of Illinois this ninth day of May in the year of our Lord one thousand nine hundred.

KOHLSAAT, J.

The said Chicago Title and Trust Company, trustee of Frank Bros. bankrupts hereby waives service of the within citation and hereby enters its appearance.

CHICAGO TITLE & TRUST CO.
Trustee of Frank Bros.,
By FELSENTHAL & FOREMAN,
Its attorneys.

(Endorsed) Filed May 16, 1900.

T. C. MacMILLAN,
Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held at the United States Court-rooms in the City of Chicago, in said Seventh Circuit, on the third day of October, 1899, in the October Term in the year of our Lord One thousand, eight hundred and ninety-nine and of our Independence the one hundred and twenty-fourth year.

And afterwards, to-wit: On the twenty-sixth day of May, 1900, in the October Term last aforesaid, came the appellants, by their counsel, Mr. Zach Hofheimer, Mr. A. J. Pflaum and Mr. S. O. Levinson, and filed in the office of the clerk of this court their appearance, said appearance being in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 698. October Term, 1899.

In re August Frank, Joseph Frank and Louis Frank, Bankrupts.

John T. Pirie, et al.,
Appellants,
vs.
Chicago Title & Trust Company, Trustee,
Appellee.

The Clerk will enter my appearance as Counsel for the Appellants.

ZACH HOFHEIMER,
A. J. PFLAUM,
S. O. LEVINSON.

Endorsed: Filed May 26, 1900.
EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the first day of June, 1900, in the October Term last aforesaid, came the appellants by their counsel, Mr. Joseph W. Moses, and filed in the office of the clerk of this court his appearance, said appearance being in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 698. October Term, 1899.

John T. Pirie, et al.
vs.
Chicago Title & Trust Company, Trustée.

The Clerk will enter my appearance as Counsel for the Appellants.

JOSEPH W. MOSES.

Endorsed: Filed June 1, 1900.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, on the same day, to wit: On the first day of June, 1900, in the October Term last aforesaid, came the appellee by its counsel, Mr. Eli B. Felsenthal, Mr. Milton J. Foreman and Mr. Herman Frank, and filed in the office of the clerk of this court their appearance, said appearance being in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 698. October Term, 1899.

In the matter of August Frank, Joseph Frank and Louis Frank, Bankrupts.

John T. Pirie et al.
vs.
Chicago Title and Trust Company, Trustee.

The clerk will enter my appearance as counsel for the appellee.

ELI B. FELSENTHAL.
MILTON J. FOREMAN.
HERMAN FRANK.

Endorsed: Filed Jun. 1, 1900.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the twenty-second day of June, 1900, o in the October Term last aforesaid, the following proceedings were had in the above entitled cause and entered of record, to-wit:

Friday, June 22, 1900.

Court met pursuant to adjournment.

Present:

Hon. William A. Woods, Circuit Judge, presiding.

Hon. Peter S. Grosscup, Circuit Judge.

John T. Pirie, Robert Scott, George Scott, Andrew McLeisch, Samuel C. Pirie, John E. Scott, and James Grassie, Trading as Carson, Pirie, Scott & Co.

698 vs.

Chicago Title and Trust Company, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

Now this day comes the parties by their counsel and this cause now comes on to be heard, and it appearing to the court, upon agreement of counsel, that the question presented upon this record is identical with that decided by the court in cause No. 640, Columbus Electric Company vs. Charles H. Worden, Trustee, it is ordered that this cause be, and the same is hereby affirmed with costs.

And it further appearing to the court that counsel for appellants and appellee have entered into a stipulation that the following findings of fact and conclusions of law be made, it is ordered that the same be, and are hereby made the findings of fact and conclusions of law in this cause.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

June Term, A. D. 1900.

In the Matter of
Frank Brothers,
Bankrupts. } No. 698.

Carson, Pirie, Scott & Company,
Appellants,
vs.
Chicago Title & Trust Company,
Trustee in Bankruptcy,
Appellee.

It is hereby stipulated by and between appellants and appellee that the following findings of fact and conclusions of law thereon be made and filed herein.

ZACH HOFHEIMER
A. J. PFLAUM
Attorneys for Appellants.
ELI B. FELSENTHAL
HERMAN FRANK
MILTON J. FOREMAN,
Attorneys for Appellee.

Endorsed, Filed June 22, 1900
Edward M. Holloway
Clerk

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

June Term, A. D. 1900.

In the Matter of Frank Brothers, Bankrupts. } No. 698.

Carson, Pirie, Scott & Company, Appellants,
vs.
Chicago Title & Trust Company, Trustee in Bankruptcy, Appellee.

Pursuant to the requirements of Subdivision 3, Rule 36 of General Orders in Bankruptcy, this Court does hereby make and file the following findings of fact and its conclusions of law thereon:

FINDINGS OF FACT.

First: That on February 11, 1899, August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, were duly adjudicated bankrupts.

Second: That for a long time prior thereto, appellants carried on dealings with the said bankrupt firm—said dealings consisting of a sale by said appellants to said Frank Brothers of goods, wares and merchandise amounting to the total sum of $4403.77.

Third: That said appellants in the regular and ordinary course of business, and within four months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares and merchandise so sold and delivered to said Frank Brothers, the sum of $1336.79, leaving a balance due, owing and unpaid amounting to $3093.98.

Fourth: That at the time this payment was made said Frank Brothers were wholly and hopelessly insolvent to the knowledge of said Frank Brothers, and that when said payments were made and at the time of the adjudication in bankrupty of the bankrupts herein, the assets of said bankrupts did not exceed the sum of $125,000, while their liabilities exceeded $500,000.

Fifth: That at the time of the payment above set forth, neither said appellants, nor any of their agents had knowledge of the insolvency of said Frank Brothers, or had reasonable cause to believe that said Frank Brothers were insolvent, and that when said payment was made, said appellants did not have reasonable cause to believe that said bankrupts by said payment intended thereby to give a preference. Nor did said Bankrupts by said payments intend thereby to give a preference.

Sixth: That at or about the time of the first meeting of the creditors herein, to wit: On March 17, 1899, said appellants duly filed a claim herein against said bankrupts' estate for their balance of said claim for goods, wares and merchandise sold by them to the bankrupts, as aforesaid;—said balance amounting to the sum of $3093.98, and that at or about the time of the said first meeting of creditors herein, said claim was duly allowed at the sum last above set forth; that thereafter, and on the 28th day of April, 1899, a dividend of 15% upon all claims which were allowed against said bankrupts' estate was duly declared by the referee herein, and that said dividend was paid to the various creditors who had proved their claims, including appellants; that the amount of the dividend paid to appellants was $464.10, which money appellants still retain, no part thereof having been repaid or returned to the trustee herein or anybody acting on behalf of said trustee.

Seventh: That at the time of the allowance of said claim and the declaration of said dividend and the payment thereof, the trustee was not aware of the fact that said appellants had received any preference on their claim and demand against said bankrupts.

Eighth. That said appellants have refused to surrender to the trustee the amount of the payment made to them by said bankrupts above set forth as a condition of the allowance of their said claim, and have by their counsel declared that it is the intention of said claimants to retain the full amount of said payment so made to them by said bankrupts, and not to surrender the same.

Ninth: That the appellee, Chicago Title & Trust Company, Trustee, which had been duly appointed trustee of the bankrupt estate of said Frank Brothers filed its petition praying that the claim of appellants against the bankrupt's estate be reconsidered and rejected, and that said appellants be ordered and required to repay to the trustee the amount of the dividend on the said claims theretofore paid to appellants, the grounds of said petition being that said appellants had within four months prior to the adjudication in bankruptcy of said bankrupts, received large sums of money as preferences, which preferences said appellants had not surrendered; that said appellants appeared in said proceedings and answered said petition.

That the Referee upon the evidence presented before him decided Find
that the said payment made by the bankrupts to said appellants constituted a preference, and that by reason of said preferences the appellants' claim should be reconsidered and rejected, and that appellants should repay to appellee the amount of the dividend on appellants' said claim theretofore paid by appellee to them the sum of $464.10; that upon appellants' application and upon the certification of the questions presented to the United States District Court for the Northern District of Illinois, the decree of the referee was confirmed and an order in the District Court was entered in accordance with the referee's said report, from which order an appeal was taken to this court.

Upon the foregoing facts this court makes the following

CONCLUSIONS OF LAW: Conc law

First: That the payment made by appellants to the bankrupts at the time and in the manner above shown constitutes a preference and that by reason of the failure and refusal of said appellants to surrender said preferences they were not entitled to prove their claim against the bankrupts' estate.

Second: That the District Court had the power and authority to order, require and compel appellants to repay to the Trustee the amount of the dividend received by appellants.

The clerk will enter the above as of the date of the order of affirmance.

W. A. WOODS,
Pres. Judge.

And afterwards, on the same day, to wit: on the twenty-second day of June, 1900, in the October Term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the above entitled cause, said opinion being in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 698.—May Session, A. D. 1900.

John T. Pirie, Robert Scott, George Scott, Andrew McLeisch, Samuel C. Pirie, John E. Scott and James Grassie, Trading as Carson, Pirie, Scott & Co., Appellants,
vs.
Chicago Title & Trust Company, Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

In re August Frank, Joseph Frank and Louis Frank, Trading as Frank Brothers, Bankrupts.

Before WOODS and GROSSCUP, *Circuit Judges:*

Per Curiam: It is agreed by counsel that the question presented upon this record is identical with that decided by this court in *Columbus Electric Co.* v. *Worden, Trustee, in re Fort Wayne Electric Corporation*, 99 Fed. 400.

The order below is therefore affirmed.

Saturday. June 23, 1900. Orde
ap
Jn

Court met pursuant to adjournment.

Present:

Hon. William A. Woods, Circuit Judge, Presiding.

Hon. Peter S. Grosscup, Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 698. May Session, A. D. 1900.

John .T. Pirie, Robert Scott, George Scott, Andrew McLeisch, Samuel C. Pirie, John E. Scott and James Grassie, trading as Carson, Pirie, Scott & Co.,
Appellants,
vs.
Chicago Title & Trust Company.
Trustee.

Appeal from the District Court of the United States for the Northern District of Illinois, Northern Division.

In re August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, *Bankrupts.*

Now this day come the parties, by their counsel, and in open court present their petition for an appeal to the Supreme Court of the United States and their assignment of errors, which said appeal is allowed upon the filing of a bond in the sum of Five Hundred Dollars, said bond to be approved by the clerk of this court; and it is further ordered that appellants be allowed thirty days from the date of the entry of decree in which to file their said appeal bond.

And afterwards, to wit, on the same day, the 23rd day of June, 1900, in the October Term last aforesaid, the appellants filed in the Office of the Clerk of this Court their Assignment of Errors, said Assignment of Errors being in the words and figures following, to wit:

United States of America,
Northern District of Illinois. } ss.

IN THE CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

In the Matter of the Estate of Frank Brothers,
Bankrupts,
Chicago Title & Trust Company,
Trustee.
In the matter of the proceedings of the Chicago Title & Trust Co., Trustee, against John T. Pirie et al.

And now this 23rd day of ~~July~~ June, A. D 1900, come said John T. Pirie, George Scott, Robert Scott, Andrew McLeish, Samuel C. Pirie, John E. Scott, and James Grassie, as copartners trading under the firm name of Carson, Pirie, Scott & Co., by Zach Hofheimer and A. J. Pflaum, their attorneys, and say that in the record and proceedings aforesaid, there is manifest error, and hereby assign the following errors upon the record in this cause.

1. The said Circuit Court of Appeals erred in making its conclusions of fact.

2. The said Circuit Court of Appeals erred in making its conclusions of law.

3. Said Circuit Court of Appeals erred in its conclusion of law in holding that the payment made by appellants to the bankrupts at the time and in the manner found and here above shown, constitutes a preference, and that by reason of their failure and neglect to surrender such preference they were not entitled to prove their claim against the bankrupts' estate.

4. That the said Circuit Court of Appeals erred in its conclusion of law that the District Court had the power and authority to order, require and compel appellant to repay to the trustee, appellee herein, the amount of the dividend received by appellants.

5. That the said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of Appeals, for the Northern District of Illinois.

Wherefore, said appellants, and each of them, ask that the order, judgment and decree aforesaid may be in all respects reversed.

(Signed) ZACH HOFHEIMER,
(Signed) A. J. PFLAUM,
Attorneys for Appellants.

Filed June 23. 1900

And afterwards, to wit, on the same day, the 23rd day of June, 1900, in the October Term aforesaid, the appellants filed in the office of the clerk of this court their appeal bond, said appeal bond being in the words and figures following, to wit:

Know All Men by These Presents, that we, John T. Pirie, Robert Scott, George Scott, Samuel C. Pirie, John E. Scott, Andrew McLeish and James Grassie, copartners doing business under the firm name of Carson, Pirie, Scott & Co., as principals and Charles B. Miller as surety, are held and firmly bound unto Chicago Title & Trust Company, Trustee of August Frank, Joseph Frank and Louis Frank, trading as Frank Bros., bankrupts, in the penal sum of Five hundred dollars ($500.00) to be paid to the said Chicago Title & Trust Company Trustee, which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this Tenth day of July, in the year of our Lord, one thousand nine hundred.

Whereas, lately in the District Court of the United States of America, for the Northern District of Illinois, in Bankruptcy, in the matter of Frank Brothers, bankrupts, said Carson, Pirie, Scott & Co., proved their claim against said bankrupts' estate for the sum of Three Thousand and ninety-three and 98/100 Dollars ($3,093.98) which said claim was allowed and in which said proceeding the said Carson, Pirie, Scott & Co. had collected a dividend on their said claim, amounting to the sum of Four Hundred and sixty-four and 10/100 Dollars dollars ($464.10); and

Whereas, a certain Order and decree was rendered in said District Court of the United States for the Northern District of Illinois, on the 9th day of May, 1900, against said Carson, Pirie, Scott & Co., ordering and adjudging that their said claim heretofore allowed, be reconsidered and rejected and the said Carson, Pirie, Scott & Co., having been ordered and decreed to pay to the Chicago Title & Trust Co., Trustee the sum of Four Hundred and sixty four and 10/100 Dollars (464.10) and

Whereas, said judgment and decree has been affirmed by the Circuit Court of Appeals for the Seventh Circuit and

Whereas said Carson, Pirie, Scott & Co., have prayed and been allowed an appeal from said order and decree of affirmance of said Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United Ststes and a citation has been issued, directed to the Chicago Title & Trust Co., Trustee citing and admonishing it, to be and appear at the Supreme Court of the United States within thirty (30) days from the date thereof.

Now then, the condition of the above obligation is such that if

the said John T. Pirie, Robert Scott, George Scott, Samuel C. Pirie, John E. Scott, Andrew McLeish and James Grassie, copartners as Carson, Pirie, Scott & Co. shall prosecute said appeal to effect and answer all damages and costs if they fail to make their appeal good, then the above obligation to be void, otherwise to remain in full force and virtue.

JOHN T. PIRIE (Seal)
ROBERT SCOTT (Seal)
GEORGE SCOTT (Seal)
SAMUEL C. PIRIE (Seal)
JOHN E. SCOTT (Seal)
ANDREW McLEISH (Seal)
By John E. Scott
one of the firm.
JAMES GRASSIE (Seal)
CHARLES B. MILLER (Seal)

O. K.
ELI B. FELSENTHAL
MILTON J. FOREMAN
HERMAN FRANK
Attys for Appellee.

Approved.
EDWARD M. HOLLOWAY,
Clerk.

Endorsed Filed June 23, 1900
Edward M. Holloway
Clerk

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 41, inclusive, contain a true copy of the transcript of record and proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, in the matter of August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, Bankrupts; John T. Pirie, Robert Scott, George Scott, Andrew McLeish, Samuel C. Pirie, John E. Scott and James Grassie, Trading as Carson, Pirie, Scott & Co., Appellants, vs. Chicago Title & Trust Company, Trustee, No. 698, October Term, 1899, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighteenth day of July, A. D. 1900.

(Seal)

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 698—October Term, 1889.

In the matter of
Frank Brothers,
Bankrupts,

John T. Pirie *et al.*,
Appellants,
vs.
Chicago Title and Trust
Company, Trustee,
Appellee.

The clerk will enter our appearance as counsel for the appellants.

HENRY ACH.
J. M. ROTHCHILD.

No. 391.
Motion to advance.
Filed Nov. 19, 1900.

FILED
NOV 19 1900
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 391.

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, TRADING AS CARSON, PIRIE, SCOTT & CO., *Appellants*,

vs.

THE CHICAGO TITLE AND TRUST COMPANY, TRUSTEE, *Appellee.*

MOTION TO ADVANCE.

MR. A. J. PFLAUM,
MR. HENRY ACH,
MR. S. O. LEVINSON,
MR. GEORGE PACKARD,
MR. J. M. ROTHSCHILD,
COUNSEL FOR APPELLANTS.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 391.

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, TRADING AS CARSON, PIRIE, SCOTT & CO., *Appellants,*

vs.

THE CHICAGO TITLE AND TRUST COMPANY, TRUSTEE, *Appellee.*

MOTION TO ADVANCE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Now come John T. Pirie, Robert Scott, George Scott, Andrew McLeisch, Samuel C. Pirie, John E. Scott, and James Grassie, copartners, trading as Carson, Pirie, Scott & Co., appellants herein, and move the court to advance the said case upon the call and set the same down at an early day for hearing and for cause of said motion show to the court that:

This is an appeal from an order and judgment of the Circiut Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United

States in and for the Northern District of Illinois, holding that the claim of Carson, Pirie, Scott & Co., creditors of Frank Bros., bankrupts, be disallowed on the ground that moneys paid by an insolvent to a creditor in the usual and ordinary course of business within four months preceeding the date of the filing of a petition in bankruptcy by said insolvent, constitutes a preference under Sections 57G and 60A and 60B of the Bankruptcy Act, irrespective of the fact that the creditor so receiving such payments is not aware of the fact that his debtor is insolvent, or that a preference is thereby intended.

Section 57G of the Bankruptcy Act is as follows:

> Section 57G.—The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.

Sections 60A and 60B are as follows:

> Section 60A — Preferred Creditors.— A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.
>
> 60B.—If a bankrupt shall have given a preference within four months before the filing of a petition or after the filing of the petition and before the adjudication and the person receiving it or to be benefited thereby or his agent acting therein shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.

The undisputed facts in this case, disclosed by the record, are that for a long time prior to the filing of the peti-

tion against the bankrupts herein, appellants had various dealings with said bankrupt firm, said dealings consisting of the sale by appellants to the bankrupts of goods, wares and merchandise; that said appellants had sold to the bankrupts merchandise of the value of $4,403.77, and that within four months prior to the adjudication in bankruptcy said bankrupts had paid to said appellants, in the ordinary and regular course of business, as partial payment of said account so sold and delivered to said bankrupts, the sum of $1,336.79, leaving a balance due, owing and unpaid, amounting to $3,093.98; that during the said four months preceding the date of adjudication of bankruptcy herein said Frank Bros., bankrupts, were wholly and hopelessly insolvent, and that at the time of the adjudication of bankruptcy their assets did not exceed the sum of $125,000, while their liabilities exceeded the sum of $500,000.

Said record will further show that at the time of the payment above set forth, neither said appellants nor any of their agents, had knowledge of the insolvency of said Frank Bros., bankrupts, or had reasonable cause to believe that said Frank Bros. were insolvent, and that when said payments were made, said Carson, Pirie, Scott & Co. did not have reasonable cause to believe that said bankrupts by said payments intended thereby to give a preference.

There is grave doubt in the minds of the several judges of our United States Courts, and of Referees in Bankruptcy, as to whether or not moneys so paid in the usual, regular and ordinary course of business and innocently received by the creditor, constitutes a preference under the foregoing sections of the act, to the extent of precluding the creditor from proving his claim, unless he

first surrender the moneys so innocently collected within said four months.

There are contrary decisions on this question by the Court of Appeals and several of the District Courts, and in order to have a uniform construction of the Bankruptcy Act, an early decision by this Honorable Court upon this question is essential.

For the purpose of settling the commercial relations between debtor and creditor, and for the purpose of enabling the creditor class of our community to do a credit business with any degree of safety, an early decision by this court of this much mooted question is imperative.

Owing to the conflict of decisions on this question creditors in certain districts are precluded from proving their claims and participating in dividends because they have received partial payments on account within four months of bankruptcy (unless they surrender moneys so received) while under the same state of facts in other Districts they are permitted to prove their claims and collect their dividends.

Every banker and merchant, in fact, the entire commercial community in this country, is interested in and anxiously awaits a speedy decision of this question.

The question of law herein involved presents itself in the administration of every bankrupt estate, in which assets have come into the trustee's hands, and on account of the conflict of decisions construing the foregoing sections of the Bankrupt Act, great confusion has arisen, and is likely to arise in the administration of bankrupts' estates. The pendency of this appeal has become generally known throughout the United States, and by reason thereof, and the unsettled condition of the law re-

garding the proper construction of said sections of the act, the declaration of dividends and the final settlement of bankrupt estates have been postponed and are held in abeyance awaiting the determination of this appeal.

We append to this motion to advance copies of petitions signed by the leading banks and commercial houses of San Francisco and Chicago, respectfully urging this Honorable Court to grant an early hearing of this cause, the original petitions having been filed with the clerk of this court.

Respectfully submitted.

A. J. PFLAUM,
HENRY ACH,
S. O. LEVINSON,
GEORGE PACKARD,
J. M. ROTHSCHILD,
Counsel for Appellants.

Owing to the great importance of the questions involved and the expense incident to the contraction of the decision we respectfully join in the motion as presented and urge this Honorable Court to advance this cause

Eli B. Felsenthal
Counsel for Chicago Title & Trust Co
Appellee

30355

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 391.

JOHN T. PIRIE ET AL., *Appellants,*

vs.

CHICAGO TITLE AND TRUST COMPANY, *Appellee.*

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

MAY IT PLEASE THE COURT:

I take the liberty and this means of calling the court's attention to a decision just published, bearing on the question in this case.

In re Hall, Vol. 2, No. 24, National Bankruptcy News & Reports, p. 1126, *published November 15, 1900.*

The referee's decision in this case shows the public importance of the question involved.

Respectfully submitted.

A. J. PFLAUM,
Counsel for Appellants.

DECISIONS BEARING ON THE QUESTION INVOLVED IN THIS APPEAL.

In re Smoke:

Volume 4, American Bankruptcy Reports, page 434.
Decision by Referee Wise affirmed by Judge Brown.
U. S. district court.

In re Piper:

Second National Bankrupt News, page 7.
Decision by Referee Crow affirmed by Judge Wellborn.
U. S. district court.

Blakeley *vs.* Bank:

95 Federal, page 267.

In re Alexander:

4th American Bankruptcy Reports, page 376.
Contra: Columbus.

Electric Co. *vs.* Worden:

99 Federal, page 400.
Decision by circuit court of appeals, 7th circuit.

Forgy *vs.* Marshall Field & Co.:

Decision by circuit court of appeals, 9th circuit, not reported.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned bankers of Chicago do hereby petition this august and honorable court to grant the motion, advancing the cause of John T. Pirie, Robert Scott *et al.*, trading as Carson, Pirie, Scott & Company *vs.* Chicago Title and Trust Company, Trustee, in the matter of August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, in Bankruptcy.

The question involved is the construction of the Bankruptcy Law, and it is of the utmost immediate importance to the entire commercial community of the United States.

THE MERCHANTS NATIONAL BANK OF CHICAGO, ILL.,
By F. W. CROSBY, V. P.

PRODUCE EXCHANGE BANK,
W. O. COOK, Cashier.

UNION TRUST CO.,
F. L. WILK, V. P.

THE BANKERS NATIONAL BANK, CHICAGO, ILLS.,
By EDWARD S. LACEY, Prest.

THE MERCHANTS LOAN & TRUST COMPANY,
ORSON SMITH, Prest.

THE NATIONAL BANK OF THE REPUBLIC, OF CHICAGO.
W. T. FENTON, Vice Pt.

HIBERNIAN BANKING ASSOCIATION, CHICAGO,
By HAMILTON B. DOX, Cashier.

THE WESTERN STATE BANK,
GEO. P. BAY, Pres.

THE FIRST NATIONAL BANK OF CHICAGO,
JAS. B. FORGAN, Pres.

THE COMMERCIAL NATIONAL BANK OF CHICAGO,
JAMES H. ECKELS, Pt.

THE CHICAGO NATIONAL BANK,
F. W. BLOUNT, Cashier.

THE CONTINENTAL NATIONAL BANK OF CHICAGO,
By JOHN C. BLACK, President.

CORN EXCHANGE NATIONAL BANK,
By C. L. HUTCHINSON, *V. P.*

THE NORTHERN TRUST COMPANY,
By BYRON L. SMITH, Prest.

THE METROPOLITAN NAT. BANK OF CHICAGO,
By E. G. KEITH, Prest.

THE AMERICAN TRUST AND SAVINGS BANK, CHICAGO.
E. A. POTTER, Prest.

GARDEN CITY BANKING & TRUST CO.,
JAMES H. GILBERT, Prest.

STATE BANK OF CHICAGO,
By H. A. HAUGAN, Pt.

FORT DEARBORN NAT'L BANK,
By JOHN A. KING, Pt.

THE IMPORTERS AND TRADERS NATIONAL BANK OF NEW YORK.

By PECKHAM, BROWN & PACKARD,
Its agents and attorneys.

IN THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, Merchants and Bankers, of San Francisco, do hereby petition this august and honorable court to grant the motion to advance the cause of John T. Pirie, Robert Scott *et al.*, trading as Carson, Pirie, Scott & Co. *versus* Chicago Title and Trust Company, Trustee, in the matter of August Frank, Joseph Frank and Louis Frank, trading as Frank Bros., in bankruptcy.

The question involved is the construction of the Bankruptcy Law, and it is of the utmost immediate importance to the entire commercial community of the United States.

Respectfully yours,

LONDON, PARIS & AMERICAN BANK, LIMITED.
THE DONOHOE, KELLY BANKING CO.
THE CROCKER WOOLWORTH NATIONAL BANK.
MERCANTILE TRUST COMPANY.
LONDON & SAN FRANCISCO BANK, L'D.
THE NEVADA NATIONAL BANK OF SAN FRANCISCO.
AMERICAN BANK AND TRUST CO.' OF SAN FRANCISCO.
W. W. MONTAGUE & CO.
THE BANK OF CALIFORNIA.
THE ANGLO CALIFORNIAN BANK, LT'D.
THE SAN FRANCISCO NATIONAL BANK.
BANK OF BRITISH NORTH AMERICA.
THE FIRST NATIONAL BANK OF SAN FRANCISCO.
BANK OF BRITISH COLUMBIA.
WELLS, FARGO & CO., BANK, SAN FRANCISCO, CAL.
MACK & CO.
JONES-PADDOCK.
SCHLOSS CROCKERY CO.
A. L. BRYAN SHOE CO.
DANIEL MCLEOD & CO.
MEYERSTEIN COMPANY.
LEVI STRAUSS & CO.

HELBING & WEDELEY.
PAYOT, UPHAM & CO.
L. DINKELSPIEL AND SONS
HEYNEMAN & CO.
THE L. ELKUS CO.
B. BLUMENTHAL & CO.
LOUIS KLINE & CO.
HOFFMAN, ROTHCHILD & CO.
CARTER & KELLY.
J. W. COLLINS.
LEOPOLD HIRSCH, MICHALITSCHKE BROS. & CO.
THE GUTTA PERCHA & RUBBER MFG. CO.
BOSTON WOVEN HOSE AND RUBBER CO.
LEEGE & HASKINS.
THE CALIFORNIA POWDER WORKS.
GOLDSTONE BROS.
WOLF BROS.
M. SCHEYER & BROS.
LOWENBERG & CO.
C. H. MEYER & BRO.
MURPHY, GRANT & CO.
HELLER, BACHMAN & CO.
THE FRIEDLANDER HAT CO.
CAHN, NICKELSBERG & CO.
BROWN BROS. & CO.
H. M. HEINEMAN.
C. A. MALM & CO.
H. & L. BLOCK.
BUCKINGHAM & HECHT.
H. S. CROCKER COMPANY.
SACHS BROS. & CO.
GREENEBAUM, WEIL & MICHELS.
SON BROTHERS & CO.
B. HART & BRO.
JULES LEVY & BROS.
G. C. HALL & SON.
REISS BROS. & CO.
CALIFORNIA NOTION & TOY CO.
S. STERNHEIM & SON.
GEO. P. IDE & CO.
KAHN BROS., KLINE & CO.
SELLER BROS. & CO.

30359

Crane Co.
George H. Tay Company.
Blake, Moffit & Towne.
Langley & Michaels Co.
Mission Soap & Candle Works.
Standard Oil Co.
Siebe Shoe Company.
Kast-Glanville Shoe Co.
San Jose W. M. Co.
D. N. & E. Walter Co.
C. P. Heininger & Co.
Nonotuck Silk Co.
Williams-Marvin Co.
Redington & Co.
C. R. Winslow & Co.
Sanborn, Vail & Co.
Hawley Bros. Hardware Co.
Dunham, Carrigan & Hayden.
Deere Implement Co.
Wellman, Peck & Co.
Abramson-Heunisch Co.
D. M. Osborne Co.
Sussman, Wormset & Co.
Pannell-Suydam Co.
H. Levi & Co.
A. Schilling & Co.
Dodge, Sweeney & Co.
Hass Bros.
Le Count Bros. & Co.
Gobel & Banner.
Hooker & Co.
Mau, Sadler & Co.
J. A. Folger & Co.
Baker & Hamilton.
American Steel & Wire Company.
Miller, Sloss & Scott.
Western Sugar Refining Co.
M. Ehrman & Co.
Sperry Flour Company.
W. Buller & Co.

No. 391.
Brf. of Pflaum, Ach, Rothschild & Levinson for Appts.
Office Supreme Court U.S.
FILED
JAN 15 1901
JAMES H. MCKENNEY
Clerk

Supreme Court of the United States.

Filed Jan. 15, 1901.

OCTOBER TERM, A. D. 1900.

No. 391.

In the matter of **AUGUST FRANK, JOSEPH FRANK and LOUIS FRANK, trading as FRANK BROS., Bankrupts**

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS TRADING AS CARSON, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY, TRUSTEE,

Appellee.

BRIEF AND ARGUMENT ON BEHALF OF APPELLANTS.

MR. A. J. PFLAUM,
MR. HENRY ACH,
MR. GEORGE PACKARD,
MR. JOSEPH M. ROTHSCHILD,
MR. S. O. LEVINSON,
COUNSEL FOR APPELLANTS.

BARNARD & MILLER PRINT, CHICAGO.

30362

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 391.

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS TRADING AS CARSON, PIRIE, SCOTT & COMPANY, *Appellants*,

vs.

THE CHICAGO TITLE & TRUST COMPANY, TRUSTEE, *Appellee.*

Brief and Argument on behalf of Appellants.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

This case is brought here on appeal from an order and judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United States in and for the Northern District of Illinois, holding that the claim of appellants, creditors of Frank Brothers, bankrupts, be disallowed, on the ground that appellants had been paid moneys by the bankrupts in the usual and ordinary course of business and without knowledge of or reasonable cause to believe the debtors insolvent or that they intended a preference, said pay-

ments having been made within four (4) months preceding the date of the filing of petition in bankruptcy.

The stipulated facts in the case, as shown by the record, page six, are: that for a long time prior to the filing of the petition against Frank Brothers, the bankrupts herein, Carson, Pirie, Scott & Company, appellants, had various dealings with said bankrupt firm, said dealings consisting of the sale by said Carson, Pirie, Scott & Company to said Frank Brothers, of goods, wares and merchandise on credit; an itemized account showing in detail the sales and the credits, consisting of payments in cash by Frank Brothers to Carson, Pirie, Scott & Company in the usual and ordinary course of business for a period of four months prior to the filing of the petition in bankruptcy, is shown on pages 8 and 9 of the record. Said account also shows in detail the dates of the respective items of debits and credits for said period of four months. It will be seen from an examination of said statement that beginning on September 12, 1898, and extending down to November 30, 1898, appellants had sold to the bankrupts, goods, wares and merchandise aggregating in all $4,131.81. The statement also shows the following items of credit:

Nov. 3 Cash paid	$858.20
Dec. 10 Cash paid	302.91
Dec. 19 Cash paid	175.68
Total cash payments	$1,336.79

and that from October 25 to December 6, the bankrupts had, at various times, returned merchandise aggregating $379.36, thus making a total credit of $1,716.15 received during the preceding four months, leaving the balance due to Carson, Pirie, Scott & Company $3,093.98.

The record further shows, page 6, that during all the times the foregoing transactions took place, said Frank Brothers were wholly and hopelessly insolvent, to the knowledge of said Frank Brothers, and that at the time of their adjudication in bankruptcy, their assets did not exceed the sum of $125,000, while their liabilities exceeded $500,000; that at the time said goods were sold by Carson, Pirie, Scott & Company to said bankrupts, and at the various times said payments were received on account by them from said Frank Brothers, neither said Carson, Pirie, Scott & Company nor any of their agents had knowledge of the insolvency of said Frank Brothers or had reasonable cause to believe that said Frank Brothers were insolvent or that when the said payments were made by said Frank Brothers to said Carson, Pirie, Scott & Company, that they or any of their agents or employes had reasonable cause to believe that it was intended thereby to give them preferences; said payments all being made in the usual, regular and ordinary course of business.

The record further shows that the claim of Carson, Pirie, Scott & Company having been proven and allowed and a dividend collected thereon, was afterwards, on petition of trustee reconsidered and disallowed, and said Carson, Pirie, Scott & Company ordered and directed to return and repay to the trustee the dividend heretofore paid to them by the trustee, amounting to the sum of $464.10. (Rec., 12 and 13.)

The ruling of the court below disallowing the claim of appellants was on the ground that the payments hereinabove set forth constituted preferences under the existing Bankrupt Act. (Rec., 33, 34 and 35.)

The sections of the Bankrupt Act upon which this decision is based are Sections 1, Sub. 25, 57 G and 60A.

Section 1. Meaning of Words and Phrases.—a. "The words and phrases used in this Act and in proceedings pursuant hereto shall, *unless the same be inconsistent with the context,* be construed as follows: * * * (25) 'transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

Section 57-g. "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Sec. 60. Preferred Creditors.—a. "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

To these we add the following sections, which we respectfully insist must be taken into consideration in determining the questions herein involved:

Sec. 60 (b). "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

"Sec. 60 c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the

time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"Sec. 3. Acts of Bankruptcy.—a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors."

"Sec 3 b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

"Sec. 67 d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

"Sec. 68. Set-offs and Counter-claims.—a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set-off against the other and the balance only shall be allowed or paid."

"b. A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which

(1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

Specification of Errors.

First. The Circuit Court of Appeals erred in holding that the payments made by bankrupts to the appellants at the time and in the manner shown by the record, constitutes a preference, and that by reason of the failure and refusal of said appellants to surrender such payments, they were not entitled to prove their claim against the bankrupt's estate.

Second. The Circuit Court of Appeals erred in holding that in the bankruptcy proceeding the District Court had the power and authority to order, require and compel appellants to repay to the trustee the amount of the dividend received by appellants.

Third. The Circuit Court of Appeals erred in affirming the ruling of the District Court in holding that the claim of appellants should be disallowed.

Fourth. The Circuit Court of Appeals erred in affirming the judgment and decree of the District Court for the Northern District of Illinois.

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BRIEF.

I.

Bankrupt acts are remedial and must be liberally construed to effect their objects and purposes.

Crook v. *Peoples National Bank*, 60 N. Y., 309.
Tiffany v. *Lucas*, 15 Wallace, 421.
In re Miller & Brentano, Deady's Rep., 513.
In re Silverman, 1 Sawyer, 410.
Blake v. *Francis Valentine & Co.*, 89 Fed. Rep., 691.
Southern Loan & Trust Co. v. *Benbow*, 96 Fed., 514.
Loveland on Bankruptcy, p. 13.
Mayer v. *Helman*, 91 U. S., 501.
Loveland on Bankruptcy, Sec. 71.
In re California Pacific R. R. Co., 3 Sawyer, 252.

II.

If there is an ambiguity in a statute, the court, in construing the law, must arrive at the intention of the legislature, and in so doing can look beyond the mere words, and will never impute an intention which will lead to injustice, oppression, absurd consequences or great public or private mischief.

City of Baltimore v. *State*, 15 Md., 376.
In re Griffin Fed. cases, No. 5815.
Taylor v. *Taylor*, 10 Minn., 107.
Provident Life Ins. Co. v. *Mercer Co.*, 170 U. S., 593.

Union Ins. Co. v. *U. S.*, 6 Wallace, 759.
U. S. v. *Kirby*, 7 Wallace, 482.
McKee v. *U. S.*, 164 U. S., 287.
Endlich on Interpretation of Statutes, Sec. 295.
Matthieson v. *Hunt*, 14 C. B., 385.
Sutherland on Statutory Construction, Sec. 324.
Knowlton v. *Yates*, 31 Calif., 83.
People v. *Turner*, 39 Calif., 37.
San Diego v. *Grannis*, 77 Calif., 511.
Potter's Dwarris on Statutes, 130.
U. S. v. *Snow*, 4 Utah, 322.
Wike v. *Campbell*, 5 Colo., 131.
Hollingsworth v. *Palmer*, 4 Exch., 281.
Thompson's Ency. of Law, Vol. 23, p. 305.
Lake Shore R. R. Co. v. *Roach*, 80 N. Y., 341.
People v. *Utica Ins. Co.*, 15 Johnson, N. Y., 358.
Jackson v. *Collins*, 3 Cowen, 89.
Delafield v. *Brady*, 108 N. Y., 524.
Fowler v. *Paget*, 7 Term., 509.
Lau Ow Ben v. *U. S.*, 144 U. S., 47.
Smith v. *Townsend*, 148 U. S., 490.
Bloomer v. *McQueen*, 55 U. S., 14 Howard, 539.
U. S. v. *Babbit*, 66 U. S., 1 Black, 55.
Union Paper Co. v. *Nixon*, 105 U. S., 766.
Guaranty Ins. Co. v. *Sellers*, 123 U. S., 276.
Blake v. *National City Bank*, 90 U. S., 23, Wallace, 307.
Bate Refrigerating Co. v. *Sulsberger*, 157 U. S., 1.

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III.

Frequently, in construing statutes, for considerations of expediency, or to prevent extreme hardship, great injustice, public or private mischief, or to avoid an absurdity or unquestioned evil consequences, courts will construe a statute against its literal meaning, and against its terms, and will change, add or omit a word, supply a sentence or change the structure thereof.

Endlich on Interpretation of Statutes, Sec. 295.
2nd Ed. Am. & Eng. Ency. of Law, Vol. 6, p. 924.
Lundrum v. *Flanigan*, 60 Kans., 436.
Wisconsin School v. *Clarke Co.*, 79 N. W., 422.
Hawkins v. *Filkins*, 24 Ark., 286.
U. S. v. *Kirby*, 7 Wallace, 482.
McKee v. *U. S.*, 164 U. S., 287.
U. S. v. *Morrisey*, 32 Fed. Rep., 148.
Wriggs v. *Palmer*, 26 N. Y. State Rep., 198.
Carpey v. *Dowdell*, 24 Calif. Decisions, 63.
Sutherland on Statutory Construction, Sec. 323.
Ex parte Walton, Law Rep., 17 Ch. Div., 746.
Sutherland on Statutory Construction, Sec. 246.
People v. *Davenport*, 91 N. Y., 574.
U. S. v. *Fisher*, 2 Cranch, 43.
Lake Shore R. R. Co. v. *Roach*, 80 N. Y., 341.
People v. *Utica Ins. Co.*, 15 Johnson, 359.
Jackson v. *Collins*, 3 Cowen, N. Y., 89.
Delafield v. *Brady*, 108 N. Y., 524.
Fowler v. *Paget*, 7 Term. Rep., 509.
Heydenfeld v. *Daney Mining Co.*, 93 U. S., 634.
U. S. v. *Goldenberg*, 168 U. S., 95.
Knowlton v. *Moore*, 178 U. S., 41.

IV.

The present bankrupt law, for the purpose of carrying out the supposed intention of Congress, has been construed against its literal terms in the following cases:

In re Scanlon, Vol. 2, N. B. & N., 58.
In re Grubbs, Wiley Co., 96 Fed., 182.
In re Carolina Cooperage Co., Vol. 2, N. B. & N., 23.
In re Richards, Vol. 2, N. B. & N., 38.

V.

A payment made in the ordinary course of business on account, to a creditor who has no knowledge of the insolvency of his debtor at the time of receiving the payment, and no reasonable cause to believe such debtor insolvent, is not a preference within the meaning of the bankrupt act.

U. S. Statute at Large, 1898, Vol. 30, p. 544.
Loveland on Bankruptcy, Sec. 135.
Blakeley v. *Booneville Bank*, 95 Fed. Rep., 267.
In re Piper, Vol. 2, N. B. & N., 9.
In re Smoke, 2 N. B. & N., 831.
In re Smoke, 2 N. B. & N., 996.
In re Hall, 2 N. B. & N., 1126.

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ARGUMENT.

I.

THE STATUTE AND ITS CONSTRUCTION.

The important question to be determined is whether under the law a preference is created by the payment of moneys on account to a creditor in the usual and ordinary course of business, the creditor having neither knowledge of his debtor's insolvency, nor any reasonable cause to believe either that the debtor was insolvent or intended by such payment to give a preference.

The court below in construing Section 57 G, Sec. 60 A and Sec. 1, Sub. 25 of the Act decided this question in the affirmative, hence this appeal.

When, in the year 1898, Congress passed the existing bankrupt law, the Supreme Court of the United States, in construing the bankrupt law of 1867, had delivered itself of the following language:

> "It would be absurd to suppose that Congress intended to set the seal of condemnation on every transaction of a bankrupt which occurred within six months of bankruptcy without regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business and *cannot be imputed to Congress without an express declaration to that effect.* . . . If it were so, no one would know with whom he could safely deal, and besides, persons in this condition (*i. e.* insolvent) would have no encouragement to make proper efforts to extricate himself from his condition."
>
> *Tiffany* v. *Lucas*, 15 Wallace, 421.

In order to properly construe a statute it is necessary to determine the objects and purposes thereof. When the Congress of 1898 acted in the premises they had before them the following language concerning the kindred law of 1867:

> "The bankrupt act is remedial and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. Such a statute is not to be construed strictly as if it were a special enactment and this the sixteenth instead of the nineteenth century. The act establishes a system and regulates in all of their details the relative rights and duties of debtor and creditor. Such an act must be construed, as indeed all acts should be, *according to the fair import of its terms, with a view to effect its objects and promote justice.*"
>
> *In re* Miller & Brentano, Deady's Reports, 513.

The language just quoted was approved by Judge Hoffman as follows:

> "Strict rules of construction which are applied on a special case where a special statute gives to a court power to do a particular thing and which prescribes the precise method in which the power shall be executed, have no application to a case like the present, where full and complete jurisdiction over an extensive subject is given to a court constituted for the purpose."
>
> *In re* Silverman, 1 Sawyer, 410.

From the foregoing quotations it will appear that when Congress proceeded to the enactment of the law it must have known the interpretation of the Supreme Court of the United States and the Federal Courts as to the effect and purposes

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and objects of the bankrupt act. Having these declarations before it, and passing the statute of which we are now seeking an interpretation, it will be presumed that Congress intended that the present act should be a remedial one, that it should be construed in the light of present existing circumstances; that it would be construed *according to the fair import of its terms, with a view to effect its objects and promote justice,* and that one of its objects was to promote and increase business and not to paralyze it, to administer general equities and not to set the seal of condemnation upon every transaction of an individual occurring within four months of his bankruptcy.

That the judiciary of the United States have placed the present law upon the same basis as the quotations just indulged in, indicate that the courts viewed the former law, is borne out by the following citation.

Mr. Justice HAWLEY, of the 9th Circuit, in construing the present act, says:

> "The National bankrupt act is remedial and is to be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice."
>
> *Blake et al.* v. *Francis Valentine & Co.,* 89 Fed. Rep., 691.

District Judge Ewart of North Carolina, referring to the present act, declared:

> "The authorities are uniform that the bankrupt act is a remedial one and to be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and promote justice."
>
> *Southern Loan & Trust Co.* v. *Benbow,* 96 Fed., 514.

Mr. Loveland, in his excellent treatise on bankruptcy, declares as follows:

> "That the purposes and objects of the act are:
>
> 1. To ascertain whether the person whose affairs are drawn in question has become a bankrupt.
>
> 2. If so, to take into legal custody all his property and assets of every description, for the purpose of making a fair and just division among all his creditors.
>
> 3. To protect the creditors from *fraud* and *unjust preferences.*
>
> 4. To ascertain the amount due to the several creditors and their priority, and
>
> 5. To relieve the bankrupt from his load of debts."
>
> Loveland on Bankruptcy, page 13.

The objects and purposes of the act being established by judicial determinations and the conclusions of learned writers, it now becomes essential to determine the meaning of certain language and certain sections heretofore quoted, contained in the act of 1898, upon the subject of what is and what is not a preference. By Section 1 of the present act, Congress undertook to define the meaning of certain words and phrases contained in the act, and amongst them the word "transfer" is defined as follows:

> "(25) Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a pledge, payment, mortgage, gift or security."

At the very inauguration of this section there is a limitation placed upon the definitions which Congress seeks to make and give, showing that Congress intended thereby that the definitions by them uttered should not be in every

instance strictly adhered to, but that they should be regarded as elastic and subject to construction by the courts, undoubtedly in furtherance of the purposes of the act, namely, to promote justice, foster business and be remedial. For they say that the words and phrases used in the act should be construed as defined in the section *"unless the same be inconsistent with the context."* Sec. 1, Act 1898.

It will be noted that although this bankrupt act and almost every other previous act in the history of England and America deals with preferences as an important subject under such acts, there is no definition of that term contained within Section 1 of the present statute. For the ordinary meaning, then, of the word "preference" we are necessarily referred to lexicographers.

> PREFERENCES: "The act of preferring one thing above another. The state of being preferred. That which is preferred. The person or thing more highly esteemed." Webster's Dictionary, Zell's Encyclopedia.

The only other provision in the act under consideration which sheds any light upon the question is section 60, which is entitled "Preferred Creditors," and not "Preferences." Subdivision a of that section declares as follows:

> "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It is upon this subdivision of section 60 construed with subdivision 25 of section 1, that it is contended by our adversaries and was held by the court below, that a payment in the ordinary course of business by a debtor to his creditor without knowledge of insolvency of the debtor on the part of the creditor, and without any intent on the part of the debtor to prefer, and without reasonable cause on the part of the creditor to believe, either that the debtor was insolvent or that he intended to prefer, constituted a preference under this act. In the construction of section 60, without the statutory definition of the word "transfer" as contained in section 1, it would be impossible to class such a payment as a preference. It is therefore for this Court to say, considering the entire act, its objects and purposes, whether Congress intended that, in construing Section 60a, the statutory definition of the word "transfer" should be applied and that such a payment should therefore come within the scope of the act, or whether, on the other hand, the ordinary meaning of "transfer" excluding such a payment, should govern.

The court will note there is a limitation contained in the word "transfer" in the very section now under consideration, for it is not all transfers made by a debtor of his property while insolvent that shall be construed against the debtor as a preference, and it is not all judgments which have been suffered or procured by an insolvent that shall be called a preference. Those only shall be deemed to be preferences as against the debtor which would enable any one of his creditors to obtain a greater percentage of his debt than any other of the creditors of the same class. To show the difficulties which would be presented in construing this section, should the contention of our adversaries be sustained, let

us illustrate: Suppose that A, being possessed of a capital of $50,000, should, on the first day of January, 1901, start in business and buy from B, C, D and E each $25,000 worth of goods; that he meet with losses or a judgment be rendered against him, which was not expected, for a large sum, and as a result he becomes insolvent, having no other liabilities. Thereafter he paid to B, C, D and E each the sum of $10,000, and within one month after the payments he went into bankruptcy. Did thosepayments constitute a preference under the act? Did one or the other in the language of the act, "obtain a greater percentage of his debt than other creditors of the same class"? If not, what other element would be necessary in order to create the preference? Would a creditor from whom the supposed individual purchased goods upon a credit subsequent to the time he made his original purchases be in the same class? Carry the illustration further: Suppose he had a secured creditor and made a payment to him within the time limit, does that creditor belong to the same class as those who were not secured? Take another view of it: Suppose he paid to all creditors who were not secured and had creditors whose securities were not ample to pay their debts, do the secured creditors belong to the same class as the unsecured under this law, so that the payment to the unsecured would warrant the courts in finding that such payments by the insolvent constitute a preference under the act? Nowhere in the act is there a classification of creditors. There are no creditors known or designated in the act as creditors of the first, second or third class. There are no creditors distinguished in the act as creditors whose claims are based upon transactions for the sale of goods as different

from creditors whose claims are based upon other transactions or any other classification designated by Congress. We present this view of the section to the court, and to a limited extent its attendant circumstances to establish the fact, that above everything else there is an ambiguity in that particular subdivision of the section. That ambiguity, perchance, may be disposed of if the court will hold, as is maintained by appellants it must, that the entire section 60 must be construed together and that subdivision (b) of that section must be construed with subdivision (a) and not as a separate enactment or a separate declaration by Congress. Unless this is done, other dire results will follow, as will be more fully set forth hereafter.

It is the conclusion of the appellants that in view of the qualification as to statutory definitions contained in section 1, the statutory definition of the word "transfer" must be held to be, so far as need be, inconsistent with the context of the law, and that in section 60 (a) it must be limited in its meaning to such transfers as the word ordinarily implies and not to payments.

Indeed, we need not step out of the narrow confines of the law itself to determine the fact that Congress intended in the context of the act to distinguish the word "payment" from "transfer." Were it otherwise, in referring to the disposition of property in any manner whatever, after the definition of the word contained in section 1, it would have been useless for the law-maker to use any other term than the word "transfer." And yet, in section 3, we find the following:

> "Acts of bankruptcy by a person shall consist of his having (1) *conveyed, transferred, concealed or*

> *removed* * * * any part of his property; (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditor over his other creditors. * * * (4) Make a general assignment for the benefit of his creditors."

It is also to be noted in subdivision (d) of Section 60 that Congress in passing this law had in mind the distinction between the payment of money and the transferring of property; otherwise, they indulged in tautology. By that section it is provided as follows:

> "d. If a debtor shall directly or indirectly, in contemplation of the filing of a petition by or against him, *pay any money or transfer property to,*" etc.

In subdivision (e) of Section 67, Congress indulged again in language which indicated that they did not intend the word "transfer" should include every means of disposing of property, such, for instance, as payments, for they say "that all *conveyances, transfers, assignments or encumbrances* of his property, or any part thereof made or given by a person adjudged a bankrupt," etc.

And again, in the same section we quote: "And all *conveyances, transfers or encumbrances* of his property made by a debtor at any time within four months," etc.

If Section 60 (a) is to be construed so as to include a payment under the word "transfer," and thus to make certain payments preferences, then it must be so construed as to make all payments preferences, irrespective of any time limit. Otherwise, the court could arbitrarily meet one condition of affairs by drawing aid and assistance from other portions of the act, and in considering another situation absolutely refuse to do so. It will be noted that in Section 60 (a) a debtor is deemed to have given a preference, etc., "if he

has suffered or procured a judgment" * * * "or made a transfer of any of his property," and the effect will be as heretofore stated. At no place in this initial subdivision of this section can be found a *time limit*. For aught that appears, any payments or any transfer made by a debtor four months, six months, one year, or perhaps any time within the statute of limitations preceding the date of the filing of his petition, must necessarily be declared a preference, if the debtor was insolvent when he made the payment. In this connection it is well to call the attention of the court to the difference in the meaning of the word insolvency under the present act and under prior acts of Congress. Under the act of 1867 an individual was legally insolvent when he was unable to pay his debts in the ordinary course of business, as they became due, irrespective of the amount of his assets or the amount of his liabilities in comparison thereto. Under the present act, no matter how far behind an individual might be in making his payments, he is not insolvent provided he has more assets than liabilities. While it may be true, under the former judicial interpretation of the word, a creditor could easily ascertain whether his debtor was meeting his payments in the ordinary course of business as they fell due; yet no one will gainsay the proposition that it is a practical impossibility to look into the affairs of another and ascertain, first, the quantity of his assets; next, their value, and, third, the amount of liabilities which an individual may be called upon to pay; and even though one were possessed of all the data necessary, namely, the property or assets and the liabilities of an individual, it would be next to impossible in many instances to determine the question of solvency or insolvency, if for no other reason, because of the difference in opinion which always exists concerning the valua-

tion of given assets, and in many instances their constant and almost daily change. Yet, to give to Section 60 (a) the construction which is demanded, and to hold that payments made by an individual while insolvent are preferences within the meaning of the act, it would follow that whatever penalty under the law rests upon a debtor or must be sustained by a creditor, is not limited by the section *to any time whatever.*

Now, as to the debtor, there is no penalty except that contained in Section 3 of the act, namely, that if he transfers while insolvent, any portion of his property to one or more creditors, *with intent to prefer such creditor over the other, he may be adjudged a bankrupt,* and a reference to Section 3 (b) of the act will indicate, however, that a petition against a debtor who is insolvent must be filed within four months after the commission of the act. It is absolutely essential to draw upon Subdivision b of Section 3 in aid of subdivision (a) thereof. Therefore, in order to obtain a time limit on the question of preferences, it is essential to draw upon subdivision (b) of Section 60. Subdivision b of Section 60, referred to as hereinbefore quoted, provides that if the bankrupt shall have given a preference within four months before the filing of a petition, and the person receiving it or to be benefited thereby shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

It is strenuously and most earnestly maintained by the appellants that in construing subdivision a of Section 60 in connection with subdivision g of Section 57, that the court shall read as understood in subdivision 60

(a) after the word "transfer" and after the word "judgment" the words contained in Subdivision b, namely:

> "And the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference."

There is no violence done by so doing, because if one is insolvent, and the creditor knows that fact, or has reasonable cause to believe it, then it almost necessarily follows that he had reasonable cause to believe that it was intended thereby to give him a preference. When the penalty visited upon a creditor who receives a payment is taken into consideration, the strength of our position and our contentions are made more manifest. This penalty is found under the title, "Proof and Allowance of Claims, Section 57 g," as follows:

> "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

This is the penalty which a creditor, receiving a preference, must stand, by the direction of the law. The nature of that statute and the construction to be given it is important.

The construction which the court below places upon these sections has the effect of preventing an innocent creditor from proving up his claim against a bankrupt, unless he surrenders all payments made to him by the debtor within four months prior to the filing of his petition. This is a penal requirement—it is against common right, it is contrary to all the law and custom heretofore existing in civilized countries. It is depriving a creditor of property of which he has already become possessed. It is practically taking away from him his property, and statutes of that kind and character have been particularly

denominated and designated by all writers and the courts as penal in their nature. Indeed, this very section has received such a construction. Mr. Referee Jones (Wis.) said:

> "This section is in the nature of a penal statute, and should be strictly construed."
>
> *In re* Eggert, 2 N. B. N., 185.

> "Statutes which prescribe the manner in which persons shall use their private property, or restrict and regulate the disposition thereof, are against common right, and must be construed strictly."
>
> Vol. 23, Eng. & Am. Ency. of Law, p. 385.

Again, the same work, on p. 375:

> "It is a well-settled rule of law that penal statutes are to be construed strictly."

And on p. 378:

> "The rule under consideration applies * * * also to all statutes which impose, as punishment, any * * * forfeitures of money or other property, or of vested rights."
>
> "Penal statutes. Those which inflict a penalty for the violation of some of their provisions."
>
> Bouvier, Law Dict.
>
> "A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited."
>
> Potter's Dwarris on Statutes & Constitutions (p. 74).

Within the definition of statutes that are penal Sutherland includes those which "impose any special burden, or take away or impair any privilege or right." (Sec. 358.)

Let us now "try out the right intendment of the law." It is a question, first, of interpretation. It requires, being a penal section, the closest possible attention to the literal

language used. Said Justice STORY, in *U. S.* v. *Gooding*, 12 Wheat., 460:

> "This is a penal act, and is to be strictly construed; that is, *with no intendment or extension beyond the import of the words used.*"

As was remarked in *State* v. *Powers*, 36 Conn., 77:

> "There is all the difference between a liberal and a strict construction of a statute. A case may come within the one unless the language excludes it, while it is excluded by the other unless the language includes it."
>
> "Penal statutes must be strictly construed, and never extended by implication."
>
> Potter's Dwarris, p. 245, N. 35.
>
> *Andrews* v. *U. S.*, 2 Story, 203.
>
> *Strinson* v. *Pond*, 2 Curt., 502.
>
> *Ferris* v. *Attwill*, 1 Blatch., C. C. R., 151.
>
> "To determine that a case is within the intention of a statute, its language must authorize us to say so."
>
> Sutherland, Stat. Cons., Sec. 349.

Now, looking at sections 57 (g) and 60 (a), and "with no intendment or extension beyond the import of the words used," what have we? In 57 (g), we find that the claims of creditors who have *received* preferences shall not be allowed unless such creditors shall surrender their preferences. What a preference is, we must look for elsewhere. What a creditor who has received a preference is, we must seek outside. What constitutes *receiving* a preference is likewise not explained. And, finally, as to *when* the preference must have been received in order to invoke the penalty, the section under discussion says nothing.

Taking section 60 (a), in the same way, we learn in what way a person shall be deemed to have *given* a preference—but for answer to the question, *when, how and where a creditor* shall be deemed to have *received* a preference, we get no solution at all within the law except as we shall hereinafter suggest.

How, then, "with no extension or intendment beyond the import of the words used," are we to gather from these two paragraphs that Congress intended and so here said, that a merchant who receives a payment on account, in ignorance of the debtor's solvency, or intent to prefer him, within *four* months of the bankruptcy of the debtor, has brought himself within the pains and penalties of section 57 (g)? It is an absolute impossibility. There is no definition in these sections of what constitutes a creditor receiving a preference without recourse "to an intendment or extension beyond the import of the words used," or at least without recourse to other parts and portions of the act. Nor do we find *any* limitation of time *when* the preference must be received to invoke the penalty, without recourse to extraneous sources. We *do* find that, so far as the debtor is concerned, if he makes a part payment on account that would give any one creditor a greater percentage of his debt than any other creditor, and *while insolvent,* he shall be deemed to have given a preference.

Our position in this connection is simply this: The two sections, 57 (g) and 60 (a) constitute a penal statute. They must be interpreted as they stand, if the position of counsel for the trustee is correct. But the language is not sufficient for the purpose claimed. It is ambiguous. We have seen that we cannot, by the rules ap-

plicable to the interpretation of penal statutes, obtain the result contended for from the language of the two sections relied on. We must travel outside, and have recourse to the subject-matter—and if we travel outside for one purpose, why not for another?

Traveling outside, and in the natural order of progress, we find, in the very next paragraph, part and parcel of the same section 60, paragraph "b," which fits perfectly into paragraph "a," rounding out and defining the complete purpose of section 60, and supplying the very missing elements, and reasserting the one dominating principle which since the dawn of business transactions in the world has visited with any penal consequences the action of a creditor in receiving what is due him—guilty knowledge of a guilty intent. Without this section 60 (b), section 60 (a) is meaningless, except where the bankrupt's own conduct is under scrutiny. Section 60 (b) makes it all clear, supplies the missing "four months," and furnishes the one and heretofore invariable test, if a creditor's acts are to be in any way tainted.

Section 60a, as we regard it, was undoubtedly passed for the purpose of establishing the status of the bankrupt, for Section A merely charges the bankrupt with *having given* a preference "if, being insolvent, he has procured or suffered a judgment to be entered against him in favor of any person or made a transfer of any of his property, etc." Nowhere in Section 60a are the rights of creditors alluded to, or sought to be affected. Congress left this subject for Subdivision B, and the reason of the distinction thus made, it seems to us, is apparent. If reference is had to Section 3a2, *supra,* we can readily see why Con-

gress, in 60a, charges the bankrupt with *having given* a preference if he made a transfer of any of his property.

If the bankrupt gives a preference within the meaning of 60a, that is, if he transfers any of his property to his creditors, he is guilty of an act of bankruptcy under the provisions of Section 3a2, and thereby subjects himself to the risk of having an involuntary petition filed against him. It seems clear from the words employed in Section 60a that Congress intended thereby to affect only the rights of the bankrupt, and this is patent when read in connection with Section 3a2.

Section 60a says plainly and directly to the bankrupt if you do thus and thus, you *"shall be deemed to have given a preference,"* and having so acted you have subjected yourself to the possibility of having Section 3a2 invoked against you and you can be thrown into bankruptcy.

But when we turn to the section of the statute which is to affect the rights of the creditor by reason of the preference defined under Section 60a, we find, under Section 60b:

> "If a bankrupt shall have given a preference within four months before the filing of a petition * * * and the person receiving or to be benefited thereby, or his agent acting therein, *shall have had reasonable cause to believe that it was intended thereby to give a preference,"* etc.

It will be thus seen that in order to affect the rights of the creditor, he or his agent must have had reasonable cause to believe that it was intended thereby to give a preference.

This in no wise destroys the effect of Section 57 g. That section can be equally enforced if the law is con-

strued as we contend. Under that section "claims" of creditors who have received preference cannot be allowed until such preferences are surrendered. The language of the act is not that a creditor cannot prove a claim upon which he has had a preference, unless he surrenders the preference, but it includes every claim which that particular creditor has at the time he seeks to enforce his debt in bankruptcy. Mr. District Judge ROGERS (Ark.), in construing the section just alluded to, held that a creditor could not prove *any* claim against the bankrupt's estate, though it be a distinct and separate debt from the one preferred, unless he surrenders the preference he has obtained.

In re Rogers Milling Co., 102 Fed. Rep., 687.
Reed v. *Finney,* Vol. 2, N. B. N., 1007.
In re Veslow, 104 Fed., 229.

Now, it certainly seems to be extraordinary to hold that if A had two or more separate claims against B, and B makes him a voluntary payment on account of one of the debts or claims and A had no knowledge of the insolvency of B at the time of the payment, that A could be prevented from proving any claim which he might have against the debtor, but if the court will consider and give to 57 g its entire effect, the result necessarily follows that the preferences referred to in that section are those defined and mentioned in subdivision b of Section 60. In other words, it never can be said that the simple payment of money on account in the usual and ordinary course of business is such a preference as to exclude one from proving his claims.

We insist that the creditor or his agent must have the knowledge or the cause to believe mentioned

in Section 60 b. It is most respectfully urged that Congress, in the arrangement of this law, and in its subdivisions, seemed to take special care to charge the creditor with knowledge and intent before his rights should be affected.

Unless this construction be placed upon the law, subdivision b of section 60 can only be held to apply to creditors who have been paid in full or a sufficient sum of money on account, to more than cover any possible dividend which they might obtain in the administration of the estate of a bankrupt. For, to give to the law the construction placed upon it by the court below, inflicts upon the innocent creditor precisely the same punishment as that visited upon the most guilty. Certainly this is such an extraordinary punishment that the penalty of barring such creditor from proving up his claims should not be imposed unless Congress intended that such part payments should be returned, and distinctly and in so many words directly and unequivocally so declared.

Now, if it was the intention of Congress that all innocent payments made within the period of four months should be returned to and become a part of the estate of the bankrupt, would they not, in passing the law, have enacted a provision similar to that contained in subdivision b of section 60, providing that the trustee could recover any and all such payments in any given case? No such intention can be imputed to Congress unless, as before stated, it has been so declared in unequivocal language. It certainly cannot be possible that Congress intended the act in any case to effect the return of those moneys and then feared to enforce the return, and penalized the creditor *just a little* for not returning it, but withheld a complete remedy. To affirm the conclusion ar-

rived at by the court below would be to say that Congress so intended in the case of innocent payees who have received a portion of their claim, but did not so intend as to innocent creditors who were fortunate enough to be paid their complete demands. In a word, we are simply contending that the every-day act of an innocent creditor in receiving payment on account of his debt should not be construed as a preference under this act, unless the intention of Congress is expressed directly and in the most positive terms to that effect.

It is not a question of the number of decisions this way or that, but of reason and of justice. In construing this law and these sections, Mr. Loveland, in his work on Bankruptcy, page 195, said:

> "A payment of money made in the ordinary course of business is not regularly deemed a preference."

And the court's attention is invited to the same author's sensible remarks in discussing this subject, to wit:

> "If the statute prevents any person who has received a preference which secures him in respect to a part of his debt or debts, from proving the balance, it might work a hardship on a diligent creditor. He may have secured such a preference more than four months prior to bankruptcy on a part of his debts, or upon one debt, and thereafter be prevented from proving the balance due him unless he surrender the valid security. On the other hand, it cannot be contended that a person who holds a *voidable* preference is entitled to prove and have his claim allowed until he has surrendered his advantage which he has secured in fraud of the act. This would seem to be the true intent and limitation of this provision."
>
> Loveland on Bankruptcy, Sec. 135.

Congress can never be presumed to have intended to impose a penalty upon ordinary business transactions—and upon an innocent party to the same, and if there be *any* construction that can be given the language to avoid such a result it is the duty of courts to adopt it.

We have shown how section 57 (g) must be interpreted in the light of the rest of the act. There is no more reason for deducing the meaning of Congress as to what constitutes receiving a preference from section 60(a) than from section 60 (b) or all of section 60 or section 3 (a), or all of the act. Nowhere in the act, or in any prior act, is a disposition expressed or shown to punish an innocent creditor.

Nowhere is there express language used declaring the reception of a payment on account of a debt by an innocent creditor a preference—and it is only by force of artful coupling or detaching of specific sections of the act to the exclusion of the spirit and terms and purposes and objects thereof, that anything even approaching the result contended for by our adversaries can appear.

As a matter of statutory construction, then, assuming that we have made out a case for construction, it is impossible to look at section 60 without seeing all subdivisions thereof. And in so doing and comparing the law of 1867, we find that Congress, in 1898, as well as in 1867, made the knowledge on the part of the creditor of the debtor's intent, absolutely essential to the visitation of a penalty upon the creditor's act. The dilemma is this: We cannot get along with section 57 (g) for any purpose pertinent to this discussion without turning to section 60. Turning there we must not limit our construction thereof to one subdivision or one part thereof.

The sub-topic "Preferred Creditors" in that section is the only portion of the act devoted solely to the subject of preferences and preferred claims and rights of preferred creditors. It defines what appears to be a preference by the debtor, and its effect as a preference as regards the cred-

itor. It is to this section alone and to this section as a whole in connection with section 3 a and the other sections quoted in the beginning of this brief, that we must look for construction of the law on preference whenever the rights of creditors are involved.

That the contention of the appellee is not the true solution of the intention of Congress is further evidenced by section 68a of the act, for, irrespective of when the transactions take place or the character thereof, it is provided by that section that in all cases (there being no limitation) of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid. This certainly is in direct contradiction of the construction placed upon the law by the Court of Appeals in this case. In fact, if their determination is at all permitted under the law, this section furnishes a contradiction of the law within itself, and whenever such a condition of affairs is presented, the courts are at liberty to consider the actual intention of Congress. Indeed, the learned Circuit Judge, in closing his opinion, indulged in this statement: "It may be difficult to reconcile the various phrases used in the act," etc.

In re Ft. Wayne Electric Co., 99 Fed., 403.

That it was not the intention of Congress to make a payment in the ordinary course of business a preference, is borne out by the Congressional records and the debates of Congress upon the act. In discussing the matter in the House, Representative Connolly of Illinois, a member of the Judiciary Committee, made the following statement:

> "To pay a creditor in the ordinary course of business is not to make him a preferred creditor; but the

debtor must do this with a specific evil intent at the time. He must do it first when he is insolvent; second, it must be done by him in contemplation of bankruptcy. And it must be done, not only in contemplation of, but with the full purpose of evading the bankruptcy act itself by giving to the person preferred an undue advantage in the distribution of his estate under the law. Now, what objection is there or could there be to such a law as that? It is not a 'preference' in the ordinary course of business. We are constantly making preferences ourselves. Men in trade all of them, at times prefer one creditor over another. It is a common occurrence in business. Here are a number of accounts due by the merchant to the wholesale dealer. He cannot pay all of them at this time. He sends a draft to A or to B, and says that to-morrow or next week he will send others to the rest of the merchants to whom he is indebted. Is that a preference within the eyes of the law? No; by no means. *Under this law it is not and cannot be a preference.* * * * So the act is carefully guarded not to interfere with those who are doing business in the ordinary way, transacting their business legitimately with a view to its proper conduct and with no intent to defraud."

Congressional Record, 55th Congress, 2nd Session, p. 1895, Feb. 18, 1898.

Senator Lindsay, of Kentucky, a member of the Senate Judiciary Committee, in discussing the bill, said:

"Preferences are forbidden, and when given with a knowledge of the creditor, his property or its value, or the money paid, may be recovered by the trustees; *payments in the ordinary course of business by the debtor in good faith will not be construed as a preference.*"

As we maintain and demonstrate that it was not the intention of Congress to pass a law making a payment in the ordinary course of business to an innocent creditor a

penal act and a preference, and that they, in fact, do not so do, we have shown that the statute is, to say the least, ambiguous, and that we are therefore entitled to a construction by the court in accordance with the following authorities:

Collins v. *New Hampshire,* 171 U. S., 30.

"On statutory questions where the human reason may pause and the judgment be suspended on account of the uncertainty in the language employed, broad considerations of expediency are not to be overlooked."

City of Baltimore v. *State,* 15 Md., 376.

"A construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither or either in so great a degree, unless the terms absolutely require such preference."

In re Griffin, No. 5815 Federal cases.

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect, and such purpose is to be taken into consideration in passing on its validity."

Collins v. *New Hampshire,* 171 U. S., 30.
Henderson v. *Wickham,* 92 U. S., 259.

"In case the real intention as deduced from the instrument itself is not indicated by the literal sense of the terms employed, the former must prevail over the latter. And where the literal interpretation involves any palpable absurdity, contradiction, or as it has been held, any extreme hardship or great injustice, the courts have deviated a little from the literal meaning of the words, and interpreted the instrument according to the apparent intent of its authors."

2d Ed., Am. and Eng. Ency. of Law, Vol. 6, p. 924.

"When a particular construction leads to a hardship, inconvenience or absurdity, the respect due from courts to a co-ordinate branch of the government or to a constitutional convention, will not permit them readily to presume that such construction was intended, and they will, under such circumstances, a little deviate from the received sense of the words, not because they have a right to disregard the will of the framers of the instrument, but for the purpose of truly arriving at and carrying out their will."

Taylor v. *Taylor,* 10 Minn., 107.

"Courts will lean to that construction of a statute which will uphold a transaction as consummated, when the good faith of all the parties is unquestionable."

Providence Life Ins. Co. v. *Mercer Co.,* 170 U. S., 593.

"If necessary to give effect to the evident intent of a statute, its language may be completed by reading into it such inadvertently omitted words as may be requisite to express its obvious sense."

Landrum v. *Flanigan,* 60 Kans., 436.

"When a statute is open to judicial construction, the court should give effect to the idea in the legislative mind, though it violates the literal sense of the words thereof."

Wisconsin, etc., School v. *Clarke Co.,* 79 N. W., 422.

"The rule of construction applicable to constitutions, as well as to legislative acts, is that if it appear that the intention is different from the literal import of its terms, then the intention must prevail."

Hawkins v. *Filkins,* 24 Ark., 286.

In the case of the *Union Insurance Company* v. *United States,* Chief Justice CHASE, in delivering the opinion of

this court, without dissent, substituted one word for another in a congressional act. And in so doing said:

> "The language of the act is certainly not clear, but when we look beyond the mere words to the obvious intent, we cannot help seeeing that the word 'or' must be taken conjunctively."

And further said that the act must be construed with reference to the general purpose and object of the act.

6 Wallace, 759.

In the case of the *United States* v. *Kirby*, 7 Wallace, 482, Mr. Justice FIELD, in delivering the opinion of the court, said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence."
>
> "It will always, therefore, be presumed that the legislature intended exceptions to its language such as would avoid results of this character. The reason of the law *in such cases* should prevail over its letter."

Mr. Justice PECKHAM, in the case of *McKee* v. *U. S.*, 164 U. S., 287, quoted with approval the language of Chief Justice TANEY in *Brewer* v. *Blougher*, 14 Peters, 178, which was as follows:

> "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

Mr. Justice Brewer of this court, sitting upon the Circuit, deliberately omitted a word from a statute of the United States, and in so doing, declared:

"It is a familiar rule that, that which is within the letter of a statute, and not within its spirit, is not within the statute; and also, that, that which is within the spirit, though not within the letter, may sometimes be declared to be within the statute, even in criminal cases."

And in construing the literal effect of the act under consideration, further said:

"Obviously that was not the intent of Congress. Through carelessness in the drafting or compilation of this section, the word was interpolated improperly, and the only fair construction of that section is to treat it as though that word was not there. So read, it gives force and validity to this clause, which otherwise it would not have. So read, it gives meaning to the whole section and carries out the obvious intent of Congress."

U. S. v. *Morrissy,* 32 Fed. Rep., 148.

To the same effect is:

Riggs v. *Palmer,* 26 N. Y. St. Rep., 198.

In a very recent decision by the Supreme Court of the State of California, not yet reported in the regular reports, the court held:

"A statute may be construed *contrary* to its literal meaning when a literal construction would result in an absurdity or inconsistency."

Carpy v. *Dowdell,* 24 Cal. Dec., 63, decided July 19, 1900.

The following is an epitome of the subject by a celebrated author on the interpretations of statutes:

"Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended,

a construction may be put upon it which modifies the meaning of the words, *and even the structure of the sentence.* This is done sometimes by giving an unusual meaning to particular words; sometimes by altering their collocation, *or by rejecting them altogether; or by interpolating other words;* under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true intention."

Endlich on the Interpretation of Statutes, Sec. 295.

Chief Justice Jarvis, in *Mathison* v. *Hunt,* 14 C. B., 385, says:

"It is not necessary to give the words used by the legislature their plain and natural meaning when such construction would only result in injustice and absurdity."

Mr. Sutherland, in his exhaustive work on Statutory Construction, Sec. 323, declares:

"A statute may be construed *contrary* to its literal meaning when the literal construction would result in an absurdity or an inconsistency, and the words are susceptible to another construction which will carry out the manifest intention."

Ex parte Walton, L. R. 17 Ch. Div. 746.

"Where general language construed in a particular sense would lead to an absurdity it may be restrained."

Sutherland on Statutory Construction, Sec. 246.
People v. *Davenport,* 91 N. Y., 574.

"Statutes will be construed in the most beneficial way their language will permit to prevent absurdity, hardship or injustice; to favor public convenience and oppose all prejudice to public interest."

Sutherland on Statutory Constructon, Sec. 324, and cases cited.

"The strict letter of the law, when the letter would lead to palpable injustice, contradiction and absurdity, will be controlled by reason and intention."

"Statutes should be so construed as to avoid absurd results not within the evil to be remedied, *and evidently not within contemplation of the legislature.*"

No construction of words is admissible, which gives to them an absurd signification if any other construction is possible.

Knowles v. *Yates,* 31 Calif., 83.
People v. *Turner,* 39 Calif., 370-379.
San Diego v. *Grannis,* 77 Calif., 511.

Much has been written upon the construction of statutes, and many are the rules laid down therefor, but the following rules, declared by the eminent Vattel, will lend aid in construing the particular law under consideration:

"Rule 34. Though a thing appears favorable when viewed in one particular light, yet if the propriety of the terms in their fullest extent lead to absurdity and injustice, their signification ought to be limited according to the rule."

"Rule 35. If there flows neither absurdity nor injustice from the strict propriety of the terms, but where a manifest equity or a great common utility requires restriction, we ought to adhere to the most limited sense which the proper signification can admit, even in an affair that appears favorable in its own nature."

Potters Dwarris on Statutes, pages 130-131.
See also *U. S.* v. *Snow,* 4 Utah, 322.
Wike v. *Campbell,* 5 Colo., 131.

It is declared to be an elementary rule that a thing which is within the letter of the law is not within the law unless it is also within the meaning of the law, and the words, if sufficiently flexible, must be construed in a sense

which, if less grammatical, may be more in harmony with their meaning.

Hollingworth v. *Palmer*, 4 Exch., 281.

Thompson Enc. Law, titles of Statutes, Vol. 23, first Ed., page 305.

This court by and through Mr. Justice WASHINGTON, on the question here discussed says:

"If from a view of the whole, or from other laws *in pari materia* the evident intention is different from the literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature. * * * So if the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may be fairly done."

"These rules are not merely artificial. They are as clearly founded in plain sense as they are certainly warranted by the principles of the common law."

U. S. v. *Fisher*, 2 Cranch., 43.

The court of last resort in the State of New York has had occasion several times to consider the question, and by unanimous opinion the following language was indulged in:

"It is manifest that this language (referring to a statute) cannot be taken literally. It cannot be doubted that the lawmakers did not intend that this law should be applied to such cases, *and yet they are within the letter of the law.*

Lawmakers cannot always foresee all possible applications of the general language they use, and it frequently becomes the duty of the Courts in construing statutes to limit their operation, so that they shall not produce absurd, unjust or inconvenient results, not contemplated or intended. *A case may be within*

the letter of the law, and yet not within the intention of the lawmakers; and in such a case a limitation and exception must be implied."

Lake Shore R. R. Company v. *Roach*, 80 N. Y., 341.
People v. *Utica Insurance Co.*, 15 Johns., (N. Y.), 358.
Jackson v. *Collins*, 3 Cow. (N. Y.), 89.
Delafield v. *Brady*, 108 N. Y., 524.

By one of the justices of England, of whom it was said by a chief justice: "That he was one of the best Crown lawyers that ever sat in 'Westminster Hall,'" the following declaration was made referring to a construction of statutes:

> "The circumstances must be taken into consideration which show that one or the other construction is reasonable, and among such circumstances it is impossible to discard the consequences. * * * otherwise a law calculated for wise purposes might be made a handmaid to oppression."

In determining that case, a bankrupt law in England was under consideration, and it was provided by the law that it was an act of bankruptcy for a man to "leave his dwelling house to the intent, or whereby his creditors might be defeated and delayed," and that case, it seems to us, bears a strong analogy to the one under consideration. It was claimed that an act of bankruptcy was committed when a man left his dwelling house, because thereby his creditors were defeated or delayed in obtaining service, or in collecting their demands. In construing the statute, however, the word "or" was changed to mean a departure from the house with the intent to defeat and delay creditors; and in refusing to adopt the literal construction of the act, Lord Kenyon said:

"I will adopt any construction that the words will bear in order to avoid such monstrous consequences."

And further declared that it was impossible for any one to be guilty of a given act without the intent to perform it.

Fowler v. *Paget*, 7 Term. R., 509.

This court has declared as follows:

"In construing a statute the court is not to look into any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it."

"If a literal interpretation of any part of it would operate unjustly or lead to *absurd results* and be contrary to the evident meaning of the act, taken as a whole, it should be rejected."

And Mr. Justice DAVIS, in speaking for the court, in that case, said:

"This interpretation (referring to the conclusion of the court), although certainly contrary to the letter of the statute, is within its spirit and reason."

Heydenfeld v. *Daney Mining Co.*, 93 U. S., 634; 3 Otto, 634.

The Hon. Chief Justice of this court, speaking for the court, and without dissenting opinion, expressed these views:

"Nothing is better settled than that a statute should receive a sensible construction, such as will effectuate the legislative intention and, if possible, so as to avoid an unjust or an absurd conclusion."

In the case from which this language is quoted, it was provided by the letter of the law that the provisions thereof should apply to all Chinamen, and yet the court stated:

"The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and that would be evidently those who are about to come to the United States for *the first time*."

Lau Ow Ben v. *U. S.*, 144 U. S., 47.

Speaking for this court Mr. Justice BREWER said:

> "It is well settled that where the language of a statute is in any manner ambiguous or the *meaning doubtful,* resort may be had to the surrounding circumstances, the history of the times, and the effect or mischief which the statute was intended to remedy."
>
> *Smith* v. *Townsend,* 148 U. S., 490.

And again the same learned justice, in a more recent case, said:

> "It is true there are cases in which the letter of the statute is not deemed controlling," and he indicates them to be "cases where the moral sense is offended, or an injustice, oppression or absurdity is involved,"

and in such cases directly infers a warrant for an interpretation against the letter of the law.

> *U. S.* v. *Goldenberg,* 168 U. S., 95.

In support of our position on these questions of construction, the following cases are also cited:

> *U. S.* v. *Babbitt,* 66 U. S.; 1 Black., 55.
>
> *Bloomer* v. *McQuewan,* 55 U. S.; 14 How., 539.
>
> *Union Paper Bag Co.* v. *Nixon,* 105 U. S., 766.
>
> *Guarantee Ins. Co.* v. *Sellers,* 123 U. S., 276.
>
> *Blake* v. *National City Bank,* 90 U. S.; 23 Wall., 307.
>
> *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S., 1-38.

We also respectfully urge upon the attention of the court a more recent determination of the subject. In construing the revenue law and that portion thereof requiring the payment of a tax on inheritances, the court, after illustrating the gross inequalities which would inevitably result from a literal construction of the act, said as follows:

"We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Knowlton v. *Moore,* 178 U. S., 41, at page 77.

By chapter 2 of the Act of Congress, approved July 1, 1898, which provides for a "Uniform System of Bankruptcy throughout the United States," the several District Courts of the United States are created Courts of Bankruptcy, and certain enumerated powers are given. In addition thereto is added the following:

"Nothing in this section contained shall be construed to deprive a Court of Bankruptcy of any power it would possess were certain specific powers not herein enumerated."

It follows as a necessary conclusion that Courts of Bankruptcy under the present act are precisely in the same category as courts of bankruptcy under the act of 1867, and in referring to that act, and the power of the courts thereunder Mr. Justice Hoffman (Cal.) said:

"The jurisdiction thus attributed to the District Courts is more varied and extensive than that conferred by all other acts of Congress combined. It was evidently the intention of Congress to establish a complete system of bankruptcy proceedings, and to confer upon courts of bankruptcy constituted by the act *plenary* jurisdiction over the whole subject and extending to all matters and things to be done under and by virtue of the bankruptcy act. *In the exercise of this jurisdiction these courts have authority to do every act necessary and proper to carry into effect the policy and purposes of the law.*"

In re Cal. Pac. R. Co., 3 Sawyer, 252.

In line with this decision Mr. Loveland, in his work on Bankruptcy, declares:

> "In construing this bankrupt act, which gives full and complete jurisdiction over the subject to courts constituted for that purpose, the strict rule of construction which is applied where a special statute gives to a court power to do a particular thing and prescribes the mode in which the power shall be exercised, has no application. The language of the act of 1898 is very broad and general, and it is to the effect that courts are made courts of bankruptcy and are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, etc."
>
> Loveland on Bankruptcy, Sec. 71.

With the plenary power vested in courts of bankruptcy and these rules of construction before the court, remembering the objects and purposes of the bankrupt act and the language of Mr. Justice DAVIS in *Tiffany* v. *Lucas, supra,* but little difficulty should be encountered in construing the act to avoid the injustice, the inconvenience and the absurd results and great public mischief which would otherwise follow.

Mr. Justice RUSSELL of the Supreme Court of the State of New York, in the case of *Crook* v. *Peoples National Bank,* referring to the present bankrupt act, 60 N. Y. Sup., 309, decided in November, 1899, says:

> "The National Bankrupt Act does not intend to interfere with or destroy the orderly business of the country or to prevent courageous struggles of persons straightened for present means to survive financial crises and regain and maintain business credit any further than the exigencies of a law more calculated in respect to the questions here involved to be preventive than remedial, absolutely required. It is indispensable that credit transactions which embrace

> a large volume of the business of this country should be undisturbed by needless doubt or perplexity, and no extension of the lines of repressive legislation beyond those of a fair construction will be had to prevent the harmonious routine of daily affairs."

Assuming the existence of the ambiguity in the law, to which we have called attention, there is no room to doubt the power of the court to construe the law so as to avoid any inconvenient results.

If, by a literal interpretation of the law, it would follow that a payment made by a debtor without knowledge of his own insolvency and without intent to prefer, and in the ordinary course of business, to a creditor who likewise is unacquainted with the insolvent condition of his debtor and who has no reasonable cause to believe that condition to exist, would be a preference under the act, and as a result the innocent creditor would lose his right to share in the avails of a bankrupt's estate, we then maintain that we are strictly within that line of authority which permits a court to construe the law against its literal meaning.

II.

INEQUALITY, INCONVENIENCE, ABSURDITY AND EFFECT OF APPELLEE'S CONSTRUCTION.

The construction of the sections of the statute involved in this appeal has a direct and far-reaching effect on the commercial interests of the country, and it is well in considering these effects, to bear in mind what has already been said concerning the objects of the act as declared by judges and law writers.

In interpreting a law the court should take into consideration the business interests of the nation and the manner in which that business is done, and must carefully weigh the effect of its rulings upon commerce generally.

The object of the bankrupt law is to foster business, and not to paralyze it.

Query: Was it the object of the lawmaker to destroy the general credit business existant in the United States? Was it to punish the diligent and the innocent creditor and to compel him to pay a penalty for his diligence and his right to do business?

It certainly cannot be presumed that Congress intended to harass and embarrass the business of the country, or create a law which would occasion great public and private mischief, or one which would prejudice public interest or work hardship to private interests, or, if enforced, lead to an absurdity; nor is the intention to be imputed to Congress that it desired to compel honest debtors upon the slightest provocation and upon a mere suspicion of their insolvency to throw up their hands and say that they must not make any effort to keep to the surface; they must not struggle in the performance of their duties; they must lose all energy and all ambition and not attempt to extricate themselves from a financial strait. The act must be held to have been passed with the intention to administer general equities, to promote justice, to prevent bankruptcy, and to encourage business and trade.

See *In re* Miller & Brentano, *supra.*

It is respectfully submitted that unless the arguments advanced by appellants be sustained, and the judgment of the Circuit Court of Appeals in the Seventh Circuit be

reversed, all the dire results suggested would be the natural and inevitable consequences of the bankrupt law.

A construction such as is contended for by appellee would tend to revolutionize business, stop the credit system and create bankrupts.

To illustrate. There is no proposition of law better settled than that the relation between a banker and depositor is one of debtor and creditor. Under the act private bankers may be adjudged bankrupts. Let us apply the doctrine determined upon by the court below to the case of a banker. Every time an individual depositor presented his check and drew out funds on account of the amount which the banker owed him, he would be receiving a partial payment. Assume an individual, or any number of individuals, who within a given period of four months had withdrawn fifty per cent. of the funds they had deposited with such banker and suddenly it was discovered that the banker was insolvent when such payments were made. Does it not sound absurd, inconvenient, inequitable, unjust, to hold that these creditors could not prove their claims in bankruptcy against the banker because they had received a payment within four months on account of their claims? Yet if the construction of the law given by the court below be affirmed such will be the direct effect in the supposed case.

Another illustration which will positively demonstrate the absurdity and injustice of the conclusion we are seeking to reverse: Suppose A has attained the age of sixty years; has acquired a competency of $100,000; has invested it by loaning it to a friend whom he deemed to be absolutely responsible; this friend has had this money at a rate of five per cent. for a long period of years;

suddenly A is called upon by his debtor and informed that he no longer desires to keep his $100,000 and wishes to repay it; A, having no other place to invest the same, finally prevails upon his debtor to retain $50,000 of the loan. Thereupon the individual, A, figuring that the returns of $50,000, *i. e.*, $2,500 per annum would more than supply his wants, distributes the $50,000 which is paid to him among his immediate relatives as gifts, or endows a chair in some university. He has no knowledge of the insolvency of his debtor at the time he receives the payment. Thereafter, and within four months after receiving the payment, and after its distribution by him as before stated, his debtor is forced into bankruptcy and it is ascertained that he was insolvent at the time of making this payment. It is absolutely impossible in any given case to tell what an estate will realize or will pay, and yet the individual A, without any fault of his own, under the construction given the law by the court below and contended for by the appellees herein, himself becomes a bankrupt, because even though the estate were to pay 40 cents on the dollar it would be a sheer impossibility for him to procure $50,000 to pay back into the estate in order to recover $40,000. Is it not apparent from this illustration that to construe the law as did the Court of Appeals for the Seventh Circuit would be to impute to Congress the desire to legislate an absurdity?

Let us take still another illustration which will also demonstrate the effect of such construction. Under the bankrupt law, in some cases, it requires three or more creditors to file a petition against an insolvent debtor. These creditors must have provable claims. If they have

received a payment, until it is surrendered, they have no provable claim. Therefore, what is there to prevent any debtor who fears bankruptcy, who has within himself the knowledge of his own affairs and his assets and his liabilities, for a period of four months, to prevent his creditors from inaugurating any proceedings in bankruptcy as against him. This he could do by partial payments to all, or a sufficient number of his creditors. In other words, if the construction given to the law is sustained it is within the power of any insolvent debtor to prevent proceedings in bankruptcy being sustained against him.

Now let the absurdity, inconvenience and injustice be made still more apparent and let us exhibit to the court how a bankrupt could take advantage of the law and his innocent creditors, and thereby perpetrate a fraud.

Suppose A to be insolvent; that he owes $100,000; that he has assets to the extent of $75,000; that of the $100,000 he is indebted to John in the sum of $30,000, to Frank in the sum of $25,000, and to A, B, C, D and E for the balance. Let us assume he desires to protect John and Frank; desires to favor those creditors to the extent of their claim, if possible. How simple it is for him to do so by making partial payments to his other creditors and then go into bankruptcy. John and Frank, who have provable claims, elect a trustee and object to the claims of all other creditors, because, forsooth, they have received a preference under the bankrupt act. Let it be remembered, as each and every man of affairs throughout the length and breadth of this country will know, that never can it be ascertained in advance of a final closing up of a bankrupt's estate, what the estate will pay. That fact

being admitted, where is the individual, the firm or the corporation who would be foolhardy enough to repay into a bankrupt's estate an honest, important payment, which he had theretofore received in the ordinary course of business? How can he tell what the assets will realize? How can he tell what liabilities will spring up against his debtor? How can he predict what litigation the estate will be put to, or what amount of the estate will be deducted by reason of court costs, referee's, trustees' and attorney's fees, and expenses of administration? In short, how can any individual, in any given case, until perhaps it is too late to prove his claim, determine whether an estate may pay an amount equal to the amount which he would be compelled to return?

Another illustration to the same purpose. Courts will take judicial knowledge of the common affairs of life and the ordinary course of business, and it is well known as a fact that much of the business of the United States is done upon a credit system and upon either a sixty, thirty or ten-day term. At a given time, then, four months prior to the filing of a petition by or against a bankrupt, he may be owing a creditor say $10,000, in the four months preceding that time, upon various transactions and upon a running account, by payments the creditor may have received a million dollars from the same debtor. Is the court to hold, as it must if this construction be followed, that in order to obtain a dividend upon $10,000 a creditor in the given case must pay into the insolvent estate one million dollars?

Now, let us submit another illustration to show that it is even possible for the debtor to make money by going

into voluntary bankruptcy, if this construction is to be sustained.

A manufacturing firm made an arrangement by which they settle all purchases made during a certain month with a sixty-day note payable at a certain bank. For five years these notes were paid at maturity by the bank. By this method the firm established a good credit, but their indebtedness to the bank gradually increased until it reached $40,000. The bank squeezed the firm for $10,000 and then forced them into bankruptcy. The firm had paid all their creditors through the note system in four months more than twice the amount owed at the time of the assignment, and none of the creditors could prove their claims except the bank, which could well afford to replace the $10,000. The firm's statement showed nominal assets of $80,000: liabilities, $75,000. In administering the estate the assets dwindled down to less than $50,000, while the liabilities remained at $75,000. As none of the creditors were foolish enough to file a claim, it leaves the bank a clear field to make their $40,000 out of the $50,000 of assets. Query: What becomes of the balance? Does this not look like a preference through a law intended to prohibit a preference?

Here is a kindred illustration: Suppose a bankrupt has paid every one of his creditors a certain amount of money in partial payments within four months preceding bankruptcy; that his assets at the time of the filing of the petition amounted to $50,000 and his liabilities were $100,000. Every creditor having received a substantial payment within four months refused to surrender the money which was collected in the usual, regular and ordinary course of business. If the construction of the court below is sound, there are *no* creditors who have provable claims against the bankrupt. Is it not the height of ab-

surdity to say that such a condition of affairs as here depicted could exist under the bankrupt act; that the bankrupt estate should have $50,000 worth of assets and liabilities of $100,000 and no creditors permitted to prove claims or molest the bankrupt? Query: Who gets the property? Did Congress intend any such absurdity? Will the courts so construe it?

Carry the last illustration a step farther and suppose that two-thirds in amount of the bankrupt's creditors had received substantial payments and that they could not therefore afford to return them; would not the bankrupt act positively and directly, as construed by the court below, result in giving a preference to the creditors to whom the bankrupt had not made any payment, because, under these circumstances they would have provable claims and an administration of the estate might pay them in full, whereas, the other creditors, who had committed no offense against the law, had conducted their business in the ordinary way, had received payment, by mail, perhaps, are placed in the position where they can obtain no dividend and no return from the bankrupt's estate. Is this equality? Is this equity? Is this justice?

The following illustration has been found in one of the opinions written by Referee WISE of New York:

> "A debtor purchases $10,000 worth of goods from each of the firms, A. & Co., B. & Co. and C. & Co., within four months of his bankruptcy. His purchase from A. & Co. is on ten days' credit. He pays this debt and A has been paid in full. Of B. & Co. he has bought two bills of $5,000 each, one on thirty days' credit, the other on four months. The debtor pays the first bill at its maturity, and B. & Co. thereby receive a payment of $5,000 on account of their debt. Upon the bankruptcy of their debtor they cannot share with C. & Co. unless they first pay back the

> $5,000 innocently received by them. Then they are not in the same class of equality with A. & Co., who can lawfully retain the $10,000 received by them within four months of the bankruptcy. If A. & Co. be held liable to pay back the $10,000 received by them then perfect equality among the creditors of the same class would be obtained when B. & Co. repaid the $5,000 received by them. But why the preference to the extent of $5,000 should be condemned in the case of B. & Co. and upheld and sanctioned to the extent of $10,000 in the case of A. & Co. does not appear, and of course cannot logically or equitably be made to appear."

Let it be remembered it is not contended by the appellees or by any one in construing the bankrupt law, that where a creditor has been paid in full within four months prior to the inauguration of proceedings in bankruptcy and the creditor has no knowledge of the insolvency of the debtor that the payment can be recovered by the trustee. A creditor who is fortunate enough, or has been sufficiently diligent to collect all of his claims, is placed in a better position than the creditor who has been indulgent with the debtor and has sought to uphold him and has not demanded the full payment of his account. This same position holds good whether the account of the creditor has matured or not. Under the construction given to the law by the court below, the debtor is in a position to discount and pay in full the bills of any given creditor, and he, the creditor is absolutely without the portals of a bankrupt court, whereas the individual or firm to whom he may be owing a larger sum of money and an older debt is deprived practically of his entire debt because the debtor has remitted him a portion thereof. Is this not absurd? Is it not inconvenient? Is it not unjust, and is it not inequitable? And is it not equally im-

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possible for this court to determine that Congress intended the condition of affairs which is here presented? Does not such an interpretation and the effect thereof shock the mind of the Chancellor? Does it not have an immediate and direct tendency to check credits? Does it not interfere with common law, with custom, and with the business of the country?

To maintain this construction you must say to your debtor when he presents you with money on account and asks you to wait for the balance because of illness in his family, accident or bad business, "No, sir; you must take back this money, keep it yourself until you can save enough to pay us in full and then give it to us, for we cannot accept your money on account." "You must get out and raise every dollar of it or we will close you up. Our reason is, if we take part of your money now, and within four months thereafter it should be discovered that you are now insolvent, we would be compelled to pay this money back before we could prove our claim, and as we cannot tell what will happen in four months we must refuse your money."

Yet if the decision of the court below in this case is to be upheld such will necessarily be the effect.

Smith, a merchant carrying on business, is indebted to his banker in the sum of $20,000. Having moneys on hand which he does not require for the moment, he pays the bank $10,000 on account, perhaps anticipating the maturity of his debt. The bank has no knowledge of his insolvency, has no reasonable cause to believe that the debtor is insolvent, and in the ordinary course of business accepts the payment. Within four months thereafter the debtor voluntarily takes advantage of the bankrupt act, and it is found he was insolvent at the time he made the

payment to the bank. A creditor, or the trustee objects to the claim of the bank which is presented for the balance, because of the payment of the first sum, and demands that before the bank can share in the debtor's estate it must first surrender the payment made in the regular and ordinary course of its business. Can it be possible that Congress ever intended that in such a case the creditor forfeits his right to file his claim unless he shall surrender to the estate the payment which he thus obtained, even though his estate may be more valuable at the time of the bankruptcy than it was at the time when the payment was made?

To proceed: Suppose the same facts to exist and that an individual who became a creditor one month before the bankruptcy proceedings and two months after the bank had received the payment, objected to the bank sharing in the dividends from the bankrupt's estate because of this alleged preference. If the law is to be construed as contended for by appellee one who became a creditor subsequent to the time of the payment which is denominated a preference, could make the objection, and thus have recourse to an estate of greater value than that which he credited. And yet, at the same time, under this construction, if the bank had been paid in full, as before stated, the transaction is ended.

Take some merchant or some bank and assume that within two weeks before an adjudication in bankruptcy the debtor had paid the bank in full, and assume further that the same debtor had made a payment on account within a month previous to his bankruptcy to some other creditor who likewise did not know of the insolvency of the common debtor, and who likewise had no reasonable

cause to believe the debtor to be otherwise than solvent, yet under the law as contended for by the appellee the bank could retain all its money and the creditor who was paid previous to the bank, but only on account, could not prove up his claim unless he surrendered the amount paid to him by the debtor.

We maintain that in the very letter of the law there stands forth the contradiction of the position of the appellee herein. We contend there can be no recovery, directly or indirectly from any creditor unless he knew the debtor was insolvent at the time of the payment or had reasonable cause to believe it and that to construe the act as contended for by the appellee, would be practically to declare that a recovery could be had without that essential condition which warrants a recovery in the letter of the law.

Yet in this case, if Carson, Pirie, Scott & Co. have a claim against Frank Brothers for $4,000 on a given day and Frank Brothers pay to Carson, Pirie, Scott & Co. on various dates on account of said claim the sum of $1,000, does not the money which was paid become the absolute property of the appellants, and have they not in addition thereto a claim against Frank Brothers for $3,000? And if you say to them: "You cannot recover your balance or any part thereof, unless you first pay to all of the creditors of Frank Brothers the sum of $1,000," is it not a recovery by a trustee from that creditor, irrespective of the fact as to whether or not the payment was intended as a preference and irrespective of the fact as to whether or not the creditor had reasonable cause to believe that it was intended as a preference. In other words, would not such a construction be in violation not only of the spirit, but of the letter of the law?

We advance another step in illustrating this matter. Suppose upon January 1st Smith was indebted to Brown in the sum of $1,000; that he paid him $500 on account; that upon that date Smith thought his assets were largely in excess of his liabilities; he had no idea he was insolvent; he did not intend to fail, and was continuing his business in the usual and ordinary manner. Assume that on the 15th day of April, within four months thereafter, by reason of losses which he had sustained and of which he had not heard prior to the time of the payment, he was insolvent when he made the payment, filed his petition in bankruptcy and scheduled Brown as a creditor to the extent of $500. Assume that his assets realized $2,500 and his liabilities were $10.000. A distribution of these assets would pay 25 per centum and would pay to Brown $250 upon his claim.

Now, if the contention of the appellee in this case is sustained, Brown would be compelled to pay into the estate of Smith, the sum of $500 to obtain a dividend on his entire claim, which dividend would amount to $250, or 50 per cent. less than the amount he surrendered. And if the court will reason it out and assume that there is no case which will arise in bankruptcy where the estate will pay dollar for dollar it will be practically impossible to present a statement of facts where any creditor who has received a payment to the extent of 50 per cent. of his claim can afford to surrender what the appellee calls a preference. Such an absurdity was never intended by Congress, and yet it is the necessary result of the construction of the law indulged in by the court below.

Again, suppose the appellants, merchants of Chicago, were the owners of a note against John Doe for the sum of $1,000, payable three months after date. Thirty days

before the maturity of the note the debtor called upon them, desiring, to a certain extent, to stop the running of interest, paid them fifty per cent. of his note, leaving a balance of $500. The note, not being due, and the appellants requiring funds, they sold the note before maturity in the open market for the sum of $500 to Richard Roe who became the purchaser of the note in good faith. The note was endorsed by the appellants without recourse. It was not paid at maturity or within a month thereafter, and perhaps two months after the appellants had received the partial payment John Doe goes into bankruptcy. Query: Can Richard Roe prove up his claim against the bankrupt's estate for the sum of $500, the amount due upon the promissory note, or must he, before he can so do surrender to the estate the sum of $500 which he never received? To say yes in answer to the latter part of the question would undoubtedly be stamped as absurd and ridiculous; yet if the construction of the court below is maintained and it should be held that Richard Roe in the given case would not be estopped or debarred from proving up his claim, why should Carson, Pirie, Scott & Co., in the illustration be deprived of their legal rights and of their right to collect their individual property? The same illustration will apply to a bank and to a merchant, and if an assignee, without notice, could prove up the claim it would be incumbent upon every merchant who received a partial payment of his account current with the debtor to immediately obtain notes for the balance and sell them to some friend or in the open market.

If the language of the law is to be enforced, as appellee declares it is written, and all the claims of creditors who have received preferences shall be rejected unless they surrender the preference, so-called, could it not be cir-

cumvented by creditors immediately upon receiving a payment in the ordinary course of business, transferring or assigning their accounts?

Under Section 68 of the act it is provided that "in all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid." In construing this section some of the courts have held that it did not refer to a creditor who had received payments on account; that it referred to original claims that a debtor might have in the given case against his creditor; that it referred to cases where both parties, the bankrupt and the creditor, occupied each to the other the relation of creditor and debtor, and *vice versa*.

If that is so, how easy it is to defeat the law as construed by the court below. What a simple thing it would be for a merchant or a banker, when a debtor desired to make a payment, to say to him, "No, we will accept no payments on account; if you have any money, you are owing us some, and we will borrow what you have and give you our note for it, and we will still maintain our original claim against you." And in this way, if the law is as determined in the court below, the entire subject can be disposed of by instructing bankers and merchants to do business in the way last indicated.

Illustration after illustration could be presented to show the absolute absurdity of the construction contended for by the appellee. It is almost unexceptional that persons in every walk of life have current accounts with those who supply them with household necessaries and the daily requirements of life. The butcher, dry goods merchant and the grocer as a rule have accounts current

as against almost all, and when one's wife makes a payment on any of these, or on account of tuition for one's children, or on account of house rent, whether by the year or by the month, the same condition of affairs would exist, and the man who daily supplies the necessaries of life could in the given case recover no *pro rata* from his debtor's estate if he had received any payment on account within four months prior to the filing of a petition in bankruptcy. Indeed many instances could be presented which would convince this court that it is a practical and absolute impossibility for a creditor to procure the funds necessary to make this repayment.

In many cases it might force a creditor to borrow money, to sell or mortgage his home, and perhaps bankrupt him. These illustrations are not fanciful. They are facts, and based upon actual transactions in life.

Mr. Referee Bullard reports having the following case at present in hand:

> "I have one case before me—a department store—at the present time there are about one hundred thousand dollars assets and about a thousand creditors. I do not suppose there are over two hundred that have not received payments within four months. Now, the result of the Columbus Electric Company doctrine would be that most of the creditors would refuse to turn back what they received and the bankrupt might get half of the hundred thousand back."

Mr. Referee Scott reports having this case in hand:

> "I have a case—The Glens Falls Umbrella Company. Since the decision in the Columbus Electric Company case the creditors have all withdrawn their proofs of claim, and unless they re-prove, there will be $10,000 that will be paid back to the company."

See National Bankruptcy News and Reports, Vol. 2, October 1, 1900, page 14.

The "Columbus Electric Company case" is the original case decided by the Court of Appeals of the Seventh Circuit upon the question here involved, and is the basis for the decision of the court below in this case.

In re Ft. Wayne Electric Corp.
Columbus Electric Co. v. *Worden,* 99 Fed. Rep., 400.

We ask, is it equitable to prevent one creditor from proving his claim, allow another to receive his money in full, and the debtor entitled to his discharge and in addition thereto, the assets out of his estate and all the while multitudinous creditors unable to take action under the law? We have no hesitation in here declaring that had the justices in the court below been fully instructed, the decision in the "Columbus Electric Company case" would have been different.

To enforce the law as construed by the court below it must now be apparent to this court, will maim if not entirely paralyze business; will practically dispose of the credit system; will occasion great injustice and inconvenience and result in many absurdities; and if this be true, then it is the opinion of counsel for the appellants that it is within the power, and, indeed, the duty of the court to construe the law so as to avoid these results. And in that connection we remind the court of the language of Mr. Justice DAVIS in *Tiffany* v. *Lucas, supra.*

III.

DECISIONS AGAINST LITERAL CONSTRUCTION.

By section 64 of the act, subdivision 4, it is provided that:

> "Wages due to *workmen, clerks or servants,* which had been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant, are debts which have a priority."

Ordinarily it certainly could not be contended that a traveling salesman working for a salary was not a servant of his employer, or that he was not a clerk.

District Judge Evans of the District Court of Kentucky held as follows:

> "A traveling salesman employed at a salary of five thousand dollars per annum was not to be preferred to the extent of three hundred dollars under this law."

But the learned judge at the same time admitted in his opinion that according to the strict letter of the statute and according to the ordinary meaning of the word, that the employe was a servant.

In re Scanlon & Co., Vol. 2, N. B. N., 58.

District Judge Phillips of Missouri held that the manager of a mercantile corporation who receives a salary of $100 per month is not a workman or servant within the meaning of the bankrupt act who is entitled to a priority of payment out of the estate. He said:

> "Doubtless the statute had reference to a man employed on some character of work, laboring for some

other person who stands to him in the relation of employer or master."

In re Grubbs-Wiley Grocery Co., 96 Fed. Rep., 182.

In re Carolina Cooperage Co., Vol. 2, N. B. N. & R., 23, it was held that the president of a banking corporation who receives a salary of $700 per annum is neither workman nor clerk, nor servant, in the sense in which the words are used in the statute, and we quote the following from the opinion:

> "It was evidently the intention of Congress to give priority to that class of laborers who, under the laws of some states would have a lien or at least be preferred to other creditors in the settlement of an estate."

A very apt illustration of reading words into a statute by the courts under the present act, and in fact of construing the act to mean other than its literal meaning, is found in the consideration of subdivision F of section 67 of the act, by which it is provided:

> "All levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent within four months prior to the filing of a petition in bankruptcy *against him*, shall be deemed null and void in case he is adjudged a bankrupt." * * *

The court will remember that when a voluntary petition is filed under the present act the adjudication follows instanter and as a matter of course. Yet notwithstanding this language just quoted, and notwithstanding the fact that in voluntary cases the adjudication follows as of course, some courts have held that subdivision F was intended by Congress to have reference as well to volun-

tary cases. And although there are many other decisions supporting that construction thereof, we need only call attention to the opinion of Circuit Judge Jenkins, sitting in the Court of Appeals in the Seventh Circuit (the same justice who rendered the opinion in the Columbus Electric Company case) in which he declared that it was the conclusion of the court that subdivision F of section 67 has application to both voluntary and involuntary cases. We quote from his opinion:

> "But to ascertain the purpose of the law-giver we must look within the four corners of the act to gather the real purpose and intent of the law, having regard to the mischief sought to be remedied. It is difficult to see why the remedy for the supposed evil should be limited to a case of involuntary bankruptcy, for it then would be within the power of the debtor to prefer one creditor and by filing a voluntary petition anticipate and prevent an attack by other creditors through involuntary proceedings. * * * We could only assent to such a proposition when compelled by clear and precise language in the act."
>
> *In re* Richards, Vol. 2, N. B. N. & R., p. 38.

There are cases, however, holding to the contrary, and as we cite this decision simply as an illustration of the application of the doctrine we contend for, it is useless to here collate all the decisions upon that proposition.

IV.

THE DECIDED CASES.

The question to be decided by this court is one that arises in almost every bankruptcy case and has been passed upon by many referees and judges of the District Courts. There is contrariety of opinion in construing the sections of the statute involved. The first judicial expression found in any of the reports bearing upon the question is that of Judge Baker (Ind.), whose language we here quote:

> "If all payments of money made within four months prior to an adjudication in bankruptcy may be recovered from a creditor simply by showing that the bankrupt intended by such payment to cheat, hinder or delay his other creditors, it would prove a serious embarrassment to commercial transactions. No person, though believing that his debtor was solvent, and that the payment was made to him without any intent to hinder, delay or defraud his other creditors, could safely receive a payment of a pre-existing debt. A construction working such inconvenience to legitimate business *ought not to be given to the statute, unless its language is so clear and explicit as to require such a construction.*"
>
> *Blakely* v. *Booneville Bank*, 95 Fed. Rep., 267.

The particular sections here involved were not under discussion when that decision was rendered, but the language and the reasoning of the learned judge apply with great force.

The next important determination on the question arose in the Southern District of California and was decided by Referee Crowe *in re* Piper, Vol. 2, N. B. N. & R., p. 9,

and was afterwards affirmed by Judge Welborn of the Southern District Court of California. It was there determined by the referee and by the court that the word "preference" in section 57 G applied only to such preferences as were defined in section 60, and that the payment of money on account in the ordinary course of business did not come within the term "transfer of property" contained in section 60A. To the opinion of the learned referee in that case attention is respectfully called, as it contains many original thoughts and sound arguments in favor of the contention of the appellants.

The opinion of Judge Welborn, affirming the decision of Referee Crowe, will be found at the same place.

About the same time Judge Baker of Indiana, *in re* Fort Wayne Electric Ry. Co., 96 Fed. Rep., p. 803, had occasion to pass upon the question and gave to the sections involved the construction asked for by the appellees herein. At about the same time Judge Hanford, of the District of Washington, *in re* Conhain, 97 Fed. Rep., 923, decided the same question, and held that where a bank had three notes and within four months prior to the filing of a petition in bankruptcy, the bankrupt paid one of the notes and a part of the second, and the bank received the same in the ordinary course of business and without any knowledge of insolvency of the debtor or reasonable cause to believe it, such bankrupt creditor could not prove up the note upon which a partial payment had been made or the note upon which no payment had been received, unless it surrendered to the trustee all the money which it had collected from the debtor within four months prior to the day of the filing of the petition.

Meantime there had been an appeal taken from the de-

cision of Judge Baker to the Circuit Court of Appeals. At about the same time *in re* Fixen, an appeal to the Circuit Court of Appeals of the Ninth Circuit was taken to obtain the conclusions of that court upon the same question. The decision of the Court of Appeals of the Seventh Circuit in the Columbus Electric Co. case was the first delivered and was published before the Fixen case was heard by the Appellate Court in the Ninth Circuit.

Quite naturally the attention of the judges of the Circuit Court of Appeals of the Ninth Circuit being drawn to the determination of the same question by the Circuit Court of Appeals of the Seventh Circuit, the same conclusion was reached in the Ninth Circuit.

In re Fixen, 102 Fed. R., 295.

Since these decisions the question has been presented in various districts to referees and district judges, and most of them have followed the decisions which we here attack. It is true, some have stated that they did so against their own convictions and because they believed it their duty to follow the Court of Appeals.

Thereafter, however, Referee Wise, *in re* Smoke, 2 N. B. N. & R., 831, refused to follow the determination of the question theretofore announced by the Court of Appeals of the Seventh and Ninth Circuits, and he was confirmed by District Judge Brown in the following language:

> "In my judgment sections 57 G and 60 A have no reference to payments made on account of debts in the regular course of business by one who, as in this case, does not know or believe himself at the time to be insolvent and he intends no preference by such payment, even though it should afterwards appear that the debtor was at the time insolvent, and that

the payment was made within four months of the commencement of bankruptcy proceedings. The above sections (G and A) contain no time limit. The phrase '*transfer of property*' in section A is not intended to cover *such a mere payment of money in good faith and in the ordinary course of business by one believing himself solvent. Such a payment I think is not a preference.*"

In re Smoke, 2 N. B. N. & R., 996.
4 Am. Bankruptcy Rep., 434.

Thereafter and in November, 1900, Referee Hotchkiss in a very extensive, able and learned opinion reviewed the entire subject, collected all the cases *pro* and *con,* reviewed the history of bankruptcy legislation in England and America, and notwithstanding his familiarity (as indicated by his opinion) with the conclusion attained by the learned justices of the Seventh and Ninth Circuit Courts of Appeal, decided in line with the contentions of the appellants herein.

This brief, owing to the importance of the subject having already consumed much space, we refrain, much against our inclination, from incorporating herein the whole opinion of the learned referee last mentioned.

In re George W. Hall, 2 N. B. N. & R., p. 1126.

It will undoubtedly be contended by the appellee that Congress intentionally omitted from section 57 G the element of the creditor's knowledge or cause to believe, because this element was incorporated into the corresponding section of the act of 1867.

This argument we believe is best answered by the Referee Hotchkiss at page 1139, 2 N. B. N. & R., and we cannot refrain from quoting him in regard thereto:

"Much has been made of the dropping from section 57G of the element of the creditor's reasonable cause to believe, the conclusion being that by the omission Congress intended to make this all important element to the part-paid innocent debtor hereafter immaterial. Much has also been said of the transposition of certain words from section 60 a of the Torrey Bill to section 60 b of the law as passed. To my mind these changes prove the converse of what is claimed.

"That the changes may be fully appreciated, the clauses as they were in the last form of the Torrey Bill (Senate Bill No. 1035, introduced by Senator Lindsay, March 22, 1897) follow:

" 'Sec. 57 g. A creditor who has received a preference and shall have had reasonable cause to believe that it was thereby intended by the debtor to give him a preference shall not be allowed to prove his claim unless he shall surrender such preference.

"Sec. 60. Preferences.—a. A debtor shall be deemed to have given a preference if, being insolvent or in contemplation of insolvency or bankruptcy, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property with intent to (1) defeat the operation of this act; or (2) enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

" 'b. If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.'

"In passing it should be noted that all previous American bankruptcy laws under which preferences were void or voidable, after describing what consti-

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tutes a preference, in the same section and paragraph specifically give power to the assignee to proceed to avoid the same (paragraph 2, Act of 1841; paragraph 35, Act of 1867). Also that in no previous statute was the method of breaking up sections into sub-sections by 'a,' 'b,' 'c,' etc., followed; the plan adopted by the framers of the present law seems, however, to have been to set off every distinct and separate sentence as a sub-section by itself. Also that in the Torrey Bill the caption of section 60 was 'Preferences,' not 'Preferred Creditors,' a change perhaps not very material here, but indicative of the idea in the minds of those who framed the clause.

"Now, if the clauses above quoted are read carefully, (1) it will be seen that had they become the law a preference would now be substantially what it was under the law of 1867, and that (2) innocent partial payments would be no more preferences now than they had been previously either in England or this country. Section 60 a and section 60 b of that bill are the almost exact equivalent of section 35 of the act of 1867. Therefore, what was more reasonable than to eliminate from section 57 g the element of the creditor's reasonable cause to believe that it was intended thereby to give a preference, the same words being in both sections, and, on the hypothesis that section 60 a and b, like section 35 of the previous law, defined a preference, being totally unnecessary in section 57 g. This, it seems, was done. In the Henderson Bill, post, section 57 g is as now.

"That this is a fair assumption is indicated by the transposition of the time limit clause from section 60 a to section 60 b at or about the same time, a transposition which, if purposely made, and section 60 a alone is to be held the definition of preference, pre-supposes an intention on the part of Congress to give a different time limit for preferences *per se* than that established for preferences that are acts of bankruptcy [paragraph 3 a (2) (3)] or that are voidable (paragraph 60 b) or that are liens (paragraph 67 c f). In the debates attending this bill no reason

appears for such a change; in fact, the debates are all the other way. (Remarks of E. C. Brandenburg, N. B. N. Rep., Vol. II., No. 21, p. 37.)

"The sections of the Henderson Bill (Congressional Record, 55th Congress, 2d Session, pp. 2042, 2043) follow:

" 'Sec. 57 g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.

" 'Sec. 60. Preferred Creditors—a. A person shall be deemed to have given a preference if, being insolvent or in contemplation of insolvency or bankruptcy he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property [with intent to (1) defeat the operation of this act, or (2)] enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"Further, as already remarked, when Congress determined on the vital change which eliminates intent, it did it with specific words, the words above in brackets having been dropped out and the 'the effect of the enforcement of such judgment or transfer will be to' being inserted in their stead; this in conference committee in June, 1898, just before the bill was passed.

"This explanation of these somewhat mystifying changes is surely more reasonable than to impute to Congress a design by the mere transposition of words to revolutionize the modern meaning of preference, not merely by eliminating the customary four months' time limit, but by striking from it both the old element of fraud on the part of the debtor and the newer element of fraud on the part of the creditor, an explanation which imputes to the nation's law-makers the senseless purpose of creating a fraudless fraud, to the confusion of business and the lasting hurt of our credit system.

"I hold, therefore, that a preference under the law of 1898 is described, not necessarily defined, by sec-

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tion 60 a and section 60 b read together, and that he who asserts that a creditor must surrender a preference must at least show (1) insolvency of the debtor, (2) reasonable cause to believe on the part of the creditor that a preference was intended, and (3) that the result will be that one of the insolvent's creditors will obtain a greater percentage of his debt than any other creditor of the same class.

"This construction harmonizes the whole statute. It recognizes the principle, hoary-headed at the time our constitution was adopted, that payments in due course of trade, while preferences literally, are not preferences legally. It puts the creditor paid in part on an exact equality with the creditor paid in full. It draws a right distinction between the guilty creditor and the innocent creditor. It establishes a day of cleavage for distribution consistent with the rest of the statute. It relieves the courts from the necessity of reading in words to accomplish equity, and it certainly does not violate the actual words of the statute as much as that which has resulted in the construction here criticised."

As stated, the first decision to sustain the contention of appellee was that of Judge Baker, *supra*. This is a later opinion of the same judge, whose words we quoted in the Blakely case, *supra*. The learned judge reasons that under clause a of section 60, an insolvent cannot *give* a preference unless a creditor *receives* a preference. This may be true, but the court seems to overlook the fact that Congress has distinguished in sections 60 a and b between the effect of *giving* a preference and of *receiving* a preference. After quoting section 60 a Judge BAKER says:

> "The insolvent cannot give a preference unless the creditor receives it."

But he fails to note the distinction drawn by Congress between the effect of giving and of receiving under sections 60 a and b, respectively. If the debtor should give a preference under a, he is guilty of an act of bankruptcy. If the creditor should receive a preference under clause b, before it can affect his rights, *he must have knowledge of the intention of the debtor.* If reference is had to the language used in 60 a it will be seen that a person shall be deemed to have given a preference, etc. The *person* giving a preference is the subject of that paragraph and is to be affected thereby. Now, under 60 b, it will be perceived that if a bankrupt shall have given a preference within four months and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, etc., then, and only in that event, are the rights of the person so receiving, affected.

Judge Baker, and later, the Court of Appeals of the Seventh Circuit, in affirming the decision of the District Court, failed to note this distinction, because they laid great stress exclusively upon section 60 a and seemed to base their opinions thereon.

In the opinion of the Court of Appeals is to be found this language:

> "The question presented is, can a creditor who has, within four months of his debtor's bankruptcy, innocently received a payment upon his debt, be permitted to prove his debt in bankruptcy proceedings and to receive from the estate of the bankrupt a dividend thereon without surrendering the preference received?"

The court then quotes section 60 a as defining a preference, and reads in connection therewith section 57 g, and seems to have overlooked the fact that if, under sections

57 g and 60 a, persons who had received payments on account, cannot prove their claims in bankruptcy on the ground that they have received a preference, that this must be so, *irrespective of the time within which these payments were so innocently received.*

In other words, if it is held that the mere payment of money under section 60 a constitutes a preference, and that that section, when read in connection with 57 g, precludes the creditor from proving his claim, why must the payment be made within the four months?

If the contention of appellee, and if the oft repeated statement of the many referees and judges of the District Court and of the court below, be true, then a person doing a credit business having at one time received the payment on account of his claim, could never prove his claim in bankruptcy against his debtor, unless he has surrendered the moneys he has collected in years gone by, if the account was a running one. This must necessarily follow if the position taken by the honorable justice who rendered the opinion in the *Columbus Electric Co.* v. *Worden, supra,* is correct, but the learned judge, in the opening statement of his opinion demonstrates that the matter could not have been clearly before the court, because he says:

> "Can a creditor who has, within *four months,* innocently received a payment, etc?"

What impressed the court that it was essential that the payments should be made within four months? Simply the fact that it was necessary to *read into* the law, as we contend should be done here, if requisite.

In section 60 b we find the express statutory enactment that knowledge or reasonable cause to believe on behalf

of the creditor is necessary before the creditor's rights can be affected.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Fixen, *supra,* seems to have committed the same error as the Court of Appeals for the Seventh Circuit. The honorable justice delivering the opinion of the court in the opening paragraph of his opinion says:

> "The question to be determined in this case is, whether a payment made on account by an innocent debtor in the ordinary course of business within four months prior to his adjudication, where it does not appear that the creditor receiving payment had reasonable cause to believe that it was intended as a preference, constitutes a preference under the bankruptcy act, that will prevent the allowance of the creditor's claim for the balance of the account."

And then Justice Morrow, as did Justice Jenkins, quotes section 60 a and reads in connection therewith section 57 g, and bases the court's opinion thereon. If the honorable justice, as announced in the opinion of the court, is relying solely and only on section 60 a, read in connection with section 57 g, why, we again ask, does he lay stress on the fact that payment must be made within four months?

There is nothing in either of these sections that gives the court information. Yet, since the decision in *Columbus Electric Co.* v. *Worden, supra,* all of the judges who have passed upon this question, and all of the referees, excepting those heretofore cited by us, have held, and based their holdings on 57 g and 60 a, that moneys paid within four months, though innocently received by the creditor, constitutes a preference. If they rely on these *two* sections, why must the payment be made within four

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months? The courts have certainly looked beyond 57 g and 60 a in determining this question. They have read, in connection therewith, section 60 b and *their* conclusion of the intention of Congress, just as we here insist this court must do.

V.

In reference to the second assignment of error herein, which is to the effect that the court erred in holding that the District Court had the power and authority to order, require and compel the appellants to repay to the trustee the amount of the dividend received by the appellants, we have but to say that the appellants stand in no other or different position than if B had been paid money by or through a mistake by A. The only remedy which A would have, would be his action at law, and no court could arbitrarily make an order directing the person who had received the money to repay the same, or to deprive him of his statutory right to a trial by jury, should he see fit to demand it upon the issue. This is all the more so because by the terms of the act all suits which must be instituted by the trustee must be instituted in the State Courts, unless by consent.

"SEC. 23.—*Jurisdiction of U. S. and State Courts.*—b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Respectfully submitted.

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JAN 18 1901
JAMES H. McKENNEY,
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No. 391.

Add'l. Brf. of Pflaum, Ach & Levinson

For Appts.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed Jan 39 18, 1901.

In the matter of **AUGUST FRANK, JOSEPH FRANK and LOUIS FRANK, trading as FRANK BROS., Bankrupts.**

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS AS CARSON, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY,

Appellee.

ADDITIONAL BRIEF AND ARGUMENT FOR APPELLANTS.

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30402

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 391.

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISH, SAMUEL C. PIRIE, JOHN E. SCOTT AND JAMES GRASSIE, COPARTNERS, AS CARSON, PIRIE SCOTT & CO., *Appellants,*

vs.

THE CHICAGO TITLE & TRUST CO., *Appellee.*

Additional Brief and Argument for Appellants.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Without receding in any way from the position taken in our original brief, but in order that this court may fully consider the questions involved, we invite the court's attention to the following proposition:

If this court does not hold (as we contend it should), that only a creditor who received a preference with reasonable cause to believe that it was intended as such, must surrender his claim before sharing in the dividends of the estate, then we submit, that to constitute a preference under the Bankruptcy Act, within either 57 G or 60 A, at least *the intent on the part of the bankrupt to prefer must be present.*

We think an examination and comparison of the pertinent sections of the present act make this proposition self-evident. Section 3, defines and enumerates acts of bankruptcy. The allegations in a petition asserting acts of bankruptcy must come within the express terms of Section 3, to give the court jurisdiction. Clause (2) of Section 3 A defines the only act of bankruptcy under which payments of money in the regular course of business, as in the case at bar, can possibly be included. For the court's convenience we reprint the sections here under discussion. Section 3 A provides:

> "Acts of bankruptcy by a person shall consist of his having * * * (2) transferred while insolvent, any portion of his property to one or more of his creditors with *intent to prefer* such creditors over his other creditors."

Sec. 3 B provides:

> "A petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy, within four months after the commission of such act."

Sec. 60 A provides:

> "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against him in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The provisions of 60A, differ by omission from the requirements of an "act of bankruptcy," under Sec. 3 in two ways:

1st. Sec. 60A does not speak of the intent on the part of the debtor to prefer his creditor, as Sec. 3A (2) does; and,

2d. No time limit of four months is provided in Section 60 A as in Section 3 B.

It is manifest that Congress, in defining preferences and acts of bankruptcy, intended that a preference against which it was legislating, if committed, would constitute an act of bankruptcy. For a preference by a debtor that does not constitute an act of bankruptcy, is a misnomer and an absurdity. And a preference by a debtor without the element of intention is no more possible than thought without mind, or matter without space.

In order to reach the conclusion that 60A should be construed alone, and that it contains in itself a satisfactory definition of a preference, Congress must be supposed to have abolished the original and fixed meaning of the word "preference," and to have declared that a new definition hitherto unknown to the lexicons and the common law, was thereby created.

Furthermore, the same reasoning would compel us to assume that Congress intended that there could be preferences under the act which were not acts of bankruptcy; that preferences could be committed by an insolvent debtor which come within the letter of Sec. 60A, but within neither the letter nor the spirit of a proclaimed act of bankruptcy under Sec. 3. Does it not strike the mind as almost absurd that Congress should have wasted its time defining an *unpreferential preference,* the commission of which is no act of bankruptcy, and of which a court of bankruptcy could not take jurisdiction or cognizance? This is the necessary conclusion to be drawn

from the eviscerated meaning of the word "preference" contended for by appellee in construing Sec. 60A. But such construction is, we submit, unsound. Suppose a petition had been filed below against Frank Bros., setting up the commission of alleged preferences literally as defined in 60A; a demurrer would have been sustained and the petition dismissed because the petition would allege no act of bankruptcy as defined by Sec. 3. So that if this court reaches the conclusion that Congress intended to eliminate the element of intent from the word "preference," then it inevitably follows that preferences can be committed which are not acts of bankruptcy, but which are defined by Congress merely as an arbitrary exercise of philologic power.

This court held under the Bankruptcy Law of 1867 that

If the debtor did not intend to give a preference and the creditor did not have reasonable cause to believe the debtor to be insolvent, the transfer is valid, although the debtor was then insolvent.

Mays v. *Fritton,* 20 Wall., 414, at p. 420.

Under the Act of 1867, the decisions were that intent means an actual design in the mind, and must be proven as a question of fact.

In re Drummond, 1 B. R., 231.
In re Cowles, 1 B. R., 280.
Perry v. *Langley,* 2 B. R., 596.
In re Goldschmidt, 3 B. R., 165.

Also, that the intent need exist only on the part of the person making the transfer. If that exists, the debtor clearly commits an act of bankruptcy, however innocent the intent of the preferred creditor or the person to whom the transfer is made.

In re Drummond, 1 B. R., 231.

That Congress included the element of intent in defining preferences under 60A is clear. Sec. 60A defines what is a preference (with the two elements necessarily imported from Sec. 3), from the point of view of the bankrupt. 60B says that where a bankrupt shall have given a preference within four months, and the person receiving it, "shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee," etc.

Now, if under Sec. 60A, a bankrupt may give a preference without the "intent to prefer" how can a creditor ever have knowledge or "reasonable cause to believe" that something existed which does not exist, namely: the intent to prefer? Thus in the case at bar, there having been no intention by the bankrupts to prefer appellants, how could appellants have had knowledge of such intention? It is clear, therefore, from 60B that the "intention to prefer" was not eliminated from preferences under 60A, but expressly recognized as an inherent attribute of the word. Congress was thus intending to give preference its settled meaning; and Sec. 60B follows logically, providing a method of recovery in all cases where the intent, which necessarily must exist in the mind of the bankrupt, is known to the creditor receiving the preference. For otherwise Sec. 60B would have provided that two things *not mentioned in 60A* must concur: 1st. The intent on the part of the bankrupt to prefer; and second, Knowledge on the part of the creditor of such intent. This is not done, because it is presumed in 60A that a preference necessarily involves the intent to prefer on the part of the debtor.

We submit that this court ought not to hold that a creditor has received a preference, unless at least the

debtor intended it as a preference. To hold otherwise would not only distort the ordinary import of an English word, but make the bankrupt act itself harmful to the very persons whom the legislation against preferences was designed to protect and benefit, namely: the creditor class. There is not a merchant in this land who is not opposed to this construction and its unjust consequences. It cannot be denied that the sections against preferences were enacted to benefit creditors, but the construction contended for by appellee works hardships and incongruities, and is reprobated by the entire creditor class. Such a construction is repugnant to the very purpose of the enactment.

*
* *

The Bankruptcy Act of 1867 and the present act are, when their various provisions are gathered together, substantially the same with regard to preferences.

Section 5021 of the Act of 1867 (Bump on Bankruptcy, p. 387) provides that

> "Any person residing and owing debts as aforesaid, who after the passage of this act, etc., * * * or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, *with intent to give a preference to one or more of his creditors* * * * shall be deemed to have committed an act of bankruptcy," etc.

And further on in the same paragraph (Bump on Bank., p. 388), it is said:

> "And if such person shall be adjudged a bankrupt, the assignee may recover back the money or prop-

erty so paid, conveyed, sold, assigned or transferred contrary to this act, providing that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent and knew that a fraud on this act was intended," etc.

Section 5084 of the act of 1867 (Bump on B., p. 628), provides that:

> "A person who * * * accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any of the provisions of this act, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit or advantage received by him under such preference."

If, in construing section 5084 of the Act of 1867, we omit the words "having reasonable cause," etc., we still have remaining the word "preference" and its original and familiar meaning. The omission of the clause "having reasonable cause," etc., does not eliminate the necessity of the intent on the part of the debtor to prefer. So that, unless Congress in the present act intended to deprive the word "preference" of its fixed meaning, the same necessity exists under 60A and 57G of the present act to prove that the payment or transfer was intended by the debtor as a preference, as under the act of 1867. In short, the act of 1867 and the present act, as regards preferences, alike involve the intent of the bankrupt.

Section 5128 of the Act of 1867 (Bump on B., p. 791), provides that:

> "If any person being insolvent * * * within four months before the filing of the petition by, or against him, with a view to give a preference to any creditor, * * * makes any payment, pledge, assignment, transfer or conveyance of any part of his

> property, * * * the person receiving such payment, etc., or to be benefited thereby, * * * having reasonable cause to believe such person is insolvent, and knowing that such * * * payment * * * is made in fraud of the provisions of this title, the same shall be void and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

It is to be noted that neither Section 5021, defining acts of bankruptcy, and providing remedies, nor Section 5084, requiring surrenders by preferred creditors before filing claims, contain any time limit, but that the time limit of four months is provided in Section 5128. Under the Act of 1867, these three sections were construed *in pari materia*, and the four months' limitation provided in Section 5128 was imported into the other sections, just as in the case at bar, we show that the four months' limitation must be imported into Section 60A.

We respectfully ask this court to give to the word preference its usual meaning and construction.

Respectfully submitted.

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No. 391.

Brief of Seligman Frank & Edward Frank
Appellees.

Filed Jan. 18, 1901

Supreme Court of the United States.

October Term, A. D. 1900.

No. 391.

In the matter of AUGUST FRANK, JOSEPH FRANK and LOUIS FRANK, trading as FRANK BROTHERS, Bankrupts.

JOHN T. PIRIE, SHERMAN SCOTT, GEORGE SCOTT, ANDREW McLENNAN, SAMUEL H. PIRIE, JOHN H. SCOTT and JAMES GRANGE, Co-partners trading as GARDNER, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee,

Appellee.

Brief and Argument on Behalf of Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 391.

In the matter of AUGUST FRANK, JOSEPH FRANK and LOUIS FRANK, trading as FRANK BROTHERS, Bankrupts.

JOHN T. PIRIE, ROBERT SCOTT, GEORGE SCOTT, ANDREW McLEISCH, SAMUEL C. PIRIE, JOHN E. SCOTT and JAMES GRASSIE, Co-partners trading as CARSON, PIRIE, SCOTT & COMPANY,

Appellants,

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee,

Appellee.

Brief and Argument on Behalf of Appellee.

STATEMENT OF THE CASE.

We desire to supplement appellant's statement of facts by calling the court's attention to the following matter appearing in the record:

On March 17, 1899, appellants filed with Frank L. Wean, Referee, to whom was referred the matter of Frank Brothers, bankrupts, a proof of debt amounting to $3,093.98, being a balance of an account for goods theretofore sold and delivered by appellants to said Frank Brothers. This claim was allowed on the

same day. (Rec., 13.) On May 19, 1900, after a dividend had been declared and appellants had received their dividends, appellee, who had been duly appointed trustee of said bankrupt estate, filed with said referee a petition praying that appellants' claim should be reconsidered and rejected in whole upon the grounds that appellants had within four months prior to the filing of the petition in bankruptcy received from the bankrupts large preferences, which preferences appellants have not surrendered, and appellee further prayed in said petition that it, as such trustee, recover from the appellants the amount of the dividends theretofore received by said appellants. To this petition appellants filed their answer, admitting that they collected in the ordinary course of business from the bankrupts within four months prior to the filing of the petition in bankruptcy the sum of $1,036.79, and alleging that appellants did not know or have reason to believe that said bankrupts were insolvent at the time the payments were made, and that they did not have reasonable cause to believe that such payment was made with any intent to give the preferences.

The Referee to whom the cause was referred found the following facts:

That the bankrupts were duly adjudicated bankrupts on the 11th day of February, 1899.

Second. That for a long time prior thereto appellants had carried on dealings with the bankrupt firm, said dealings consisting of the sale of goods, wares and merchandise by appellants to the bankrupts, the total amount of said sale being $4,403.77.

Third. That appellants in the regular and ordinary course of business and within four months prior to the adjudication in bankruptcy collected and received from bankrupts in partial payment of said account for said goods,

wares and merchandise the sum of $1,036.79, leaving a balance due, owing and unpaid of $3,093.98.

Fourth. That at the time these payments were made said bankrupts were wholly and hopelessly insolvent to their own knowledge, and from that time and up to the date of the adjudication in bankruptcy, the assets of the brankrupts did not exceed the sum of $125,000, while their liabilities exceeded $500,000.

Fifth. That at the time of these payments neither appellants nor their agents had knowledge of the insolvency of said bankrupts or had reasonable cause to believe that said bankrupts were insolvent, and that when said payments were made said appellants did not have reasonable cause to believe that said bankrupts by said payments thereby intended to give a preference.

That at or about the time of the first meeting of the creditors, to-wit, March 14, 1899, appellants filed their claim against the bankrupt estate for their said balance, to-wit, $3,093.98, which claim was duly allowed.

That thereafter and on the 28th day of April, 1899, a dividend of 15 per cent. upon all claims which were allowed against the bankrupt estate was duly declared by the referee, which dividend was paid to the various creditors who had proved their claims, including appellants; that the amount of the dividend paid to appellants was $464.10, which appellants still retain, no part thereof having been repaid to the trustee.

That at the time of the allowance of said claim and the declaration of said dividend appellee was not aware that appellants had received any preference on their claim and demand against said bankrupts.

That appellants had refused to surrender to the trustee the

amount of the payments made to them by the bankrupts as a condition of the allowance of their claim, and have by their counsel declared that it is the intention of appellants to retain the full amount of said payments so made by said bankrupts and not to surrender the same.

The referee further reported that at the hearing it was expressly stated that the questions to be passed upon were:

First. Whether payments made to creditors by bankrupts within four months prior to their adjudication in bankruptcy, which said payments were made in the regular and ordinary course of business, constitute preferences, whether the creditors receiving such payments were aware of the insolvency of said bankrupts or not, or had reasonable cause to believe that by reason of such payments a preference was intended.

Second. Whether in the proceeding for the reconsideration and rejection of the claim the bankrupt court had the power and authority to order, require and compel said appellants to repay to appellee the amount of the dividend received by them after their claim had been rejected.

The referee further reported that by reason of such payments made by bankrupts to appellants within four months prior to the adjudication in bankruptcy said bankrupts gave a preference to appellants and appellants did receive a preference from said bankrupts in that said bankrupts did within said time make a transfer to said appellants, and the effect of said transfer was that said appellants did obtain a greater percentage of the debt due to them from the bankrupts than other creditors of said bankrupts of the same class.

The Referee therefore made the following order:

First. That appellants' claim theretofore filed and allowed should be reconsidered.

Second. That appellants' claim should be rejected and expunged.

Third. That the bankruptcy court in the proceeding brought to reconsider and reject said claim has the power and authority to order, require and compel appellants to repay to appellee the amount of dividend received by them.

Fourth. That appellants shall pay to appellee the amount of said dividend, to wit, the sum of $464.10. (Rec., 10-13.)

This report and order of the referee was confirmed by Honorable C. C. Kohlsaat, Judge of the District Court, on May 9, 1900, and on the same day appellants prayed an appeal to the United States Circuit Court of Appeals for the Seventh Judicial Circuit from this order and decree. (Rec., 18, 19 and 20.)

The United States Circuit Court of Appeals for the Seventh Judicial Circuit on June 22, 1900, entered an order affirming the said order and decree (Rec., 35, 36), and pursuant to the requirements of Subdivision 33, Rule 36 of the general orders in bankruptcy, made and filed findings of fact and conclusions of law thereon, which findings of fact and conclusions of law are in all respects similar to those made and found by the referee. (Rec., 33, 34, 35.)

There are thus presented on this appeal two questions to be decided:

1. Whether payments made to creditors by bankrupts within four months prior to their adjudication in bankruptcy, which said payments were made in the regular and ordinary course of business, constitute preferences, whether the creditors receiving such payments were aware of the insolvency of said bankrupts or not, or had reasonable cause to believe that by reason of such payments a preference was intended.

B. Did the District Court in the proceedings brought for reconsideration and rejection of appellants' claim have the power and authority to order, require and compel appellants to repay to appellee the amount of the dividend received by them.

The opinion of the court below is as follows:

"*Per Curiam.* It is agreed by counsel that the questions "presented upon the record are identical with that decided "by this court in *Columbus Electric Co.* v. *Warden, Trustee,* "*in re* Fort Wayne Electric Corporation, 99 Fed., 400.

"The order below is therefore affirmed."

The decision referred to in the opinion of the learned court below is printed in full in the appendix to this brief.

BRIEF.

I.

A creditor who has received payments on account within four months prior to the adjudication in bankruptcy cannot have his claim allowed without first surrendering such payments. Such payments constitute preferences under Sections 57*g* and 60*a*, although they were received in due course of business, in good faith, and without intent on the part of either the creditor or debtor or knowledge on the part of the creditor that a preference was intended by such payment.

Columbus Electric Company v. *Worden, Trustee, in re* Fort Wayne Electric Corporation (U. S. Circuit Court of Appeals, 7th Circuit), 99 Fed. Rep., 400.

In re Fixen (U. S. Circuit Court of Appeals, 9th Circuit), 102 Fed. Rep., 295.

In re Jones, 4 A. B. R., 563.

In re Teslow, 104 Fed. Rep., 229.

In re Arndt, 104 Fed. Rep., 234.

In re Gillette, 104 Fed. Rep., 770.

In re Schmerschel Cloak & Suit Co., 104 Fed. Rep., 64.

In re Conhaim, 97 Fed. Rep., 923.

In re Sloan, 102 Fed. Rep., 116.

In re Rogers Milling Co., 102 Fed. Rep., 687.

In re Christensen, 101 Rep., 224.

In re Strobel & Wilken Co. v. *Knost*, 99 Fed. Rep., 409.

In re Beswick, 2 N. B. N., 808.

In re Thompson, 2 N. B. N., 1016.

In re Jourdan, 2 N. B. N., 581.

In re Wise, 2 N. B. N., 157.

In re Ryan, 2 N. B. N., 693.
In re Siegel-Hillman Co., 2 N. B. N., 933.
In re Flick, 3 N. B. N., 71.
Loveland on Bankruptcy, 257.
Collier on Bankruptcy, 285-286.
Brandeburg on Bankruptcy, 296.
Lowell on Bankruptcy, 43.

II.

The bankruptcy court has the power in proceedings brought to reconsider and reject claims which have been allowed and upon which dividends have been paid, to require the creditor whose claim has been so reconsidered and rejected and who has received a dividend, to repay such dividend to the trustee.

Bankrupt Act of 1898, Section 57, Subdivisions 2, *d, f, k, l* and *n*. Section 2 (2), (7), (15).
Ex parte Bolten *et al.*, 1 Deacon & Chitty's Rep., 556.

ARGUMENT.

I.

First.

INTERPRETATION OF SECTIONS 57*g* AND 60*a* OF THE BANKRUPT ACT.

The principal question presented on this appeal is correctly put in appellants' brief. It is whether under the present Bankrupt Act payments made to a creditor by an insolvent within four months prior to the adjudication in bankruptcy, in the ordinary course of business constitute preferences, whether the creditor receiving such payment was at the time aware of the insolvency of such bankrupt or not, or had reasonable cause to believe that by reason of such payment a preference was intended.

This question was definitely raised, and answered in the affirmative by the Circuit Court of Appeals for the Seventh Circuit *in re* Worden, 99 Fed. Rep., 400; by the Circuit Court of Appeals for the Ninth Circuit *in re* Fixen, 102 Fed., 295, by at least ten district Judges and by as many Referees.

There is a remarkable unanimity of opinion on this question in all of the courts below, despite the fact that appellants upon their application to have this cause advanced claimed that there was a vast diversity of opinion. We have been able to find among the reported cases only three holding to the contrary, to-wit, *in re* Piper, 2 N. B. N., 7; *in re* Smoke, 2 N. B. N., 831; *in re* Hall, 2 N. B. N., 1126.

The first of the cases above cited, *in re* Piper, having been decided by a Judge of the California District Court, was

virtually overruled by its appellate tribunal, the United States Circuit Court of Appeals for the Ninth Circuit, which decided the *Fixen* case. This leaves but two cases as against the vast array of decisions and authorities cited in the foregoing brief. Both of these cases are decisions of referees.

It is true that the decision of Referee Wise *in re* Smoke, *supra*, was affirmed by Judge Brown of the Southern District of New York, 104 Fed. Rep., 289, but a reference to the opinion of the learned Judge will show that he affirmed the decision of the referee solely upon the ground that no proof was offered to show at the time of the making of the alleged preferential payments the bankrupt was insolvent. The court wholly ignored the question argued by the referee and presented on this appeal.

The following is the opinion of Judge BROWN *in re* Smoke:

"In my judgment Sections 57*g* and 60*a* have no reference "to payments made on account of debts in the regular course "of business *by one* who, as in this case, *does not know or "believe himself at the time to be insolvent* and who intends "no preference by such payment, even though it should af- "terwards appear that the debtor was at the time insolvent, "and the payment was within four months of the commence- "ment of bankruptcy proceedings. The above sections (*g* "and *a*) contain no time limit. The phrase 'transfer of "property' in Section 60*a* is not intended to cover such a "mere payment of money in good faith, and in the ordinary "course of business *by one believing himself solvent*. Such "a payment I think is not a preference.

"Above ruling affirmed ON THIS GROUND."

The fact that Judge Brown affirmed the decision of Referee Wise only upon the ground that it had not been made to appear that the bankrupt was insolvent at the time the alleged preferential payments were made is proof conclusive

that he did not agree with the Referee on his opinion that Sections 57*g* and 60*a* should receive the construction contended by appellants.

The remaining decision against the prevailing opinions, *Re Hall,* was written by Referee Hotchkiss. The opinion of this Referee is in the face of the decisions of all previously reported cases, including a very lengthy and analytical opinion of the learned Referee himself. *In re Aaron Meyers* (1 A. B. R., 1; S. C., 1 U. B. N., 208), Mr. Hotchkiss refers to the marked differences in phraseology between terms used in corresponding provisions of the Bankrupt Act of 1867 and the present act, and he argues therefrom Congress intended thereby a change of meaning. He says among other things that the present law looks to the effect, rather than the intent, in creating a preference. We shall refer to this diversity of opinion of the same Referee, in a subsequent part of our brief. There is practically, therefore, no decision worthy of serious consideration by this court of any of the courts below or of any Referee, which militates against the theory entertained by the court below.

Although the numerous authorities cited in our brief sustain the construction given by the court below to the sections of the Bankruptcy Act under consideration, a perusal of the opinions expressed by the Judges will show that they arrived at their decisions not on account of the opinion of the Circuit Court of Appeals in the *Worden* case, and not in blind obedience thereto, but for the reason that that construction met with their fullest approval.

It would certainly seem clear that the decisions of these various eminent authorities, and the conclusions and opinions of so many Circuit Court Judges, District Court Judges and Referees ought to firmly establish an ordinary legal proposition, and a court should hesitate long before attempting to overthrow such a strong array of judicial approval

and decisions. It was our intention at the outset to answer appellants' brief fully and at length and to meet one by one the arguments advanced by them, but upon a perusal of the published reports of the cases in the courts below holding that payments made under the circumstances referred to constitute preferences, we find that almost all the points advanced by appellants are so fully and ably discussed and the various phases of the questions presented have been so extensively treated by these various courts, Judges and Referees, that it would seem to be a work of supererogation to go over the entire ground and to argue in detail the various theories upon the proposition *pro* and *con*. A reading of these reported cases will satisfy this court that the identical arguments adduced by appellants have been used and presented to the other courts. For instance, the opinion of the Circuit Court of Appeals in the *Fixen* case will demonstrate that a substantial portion of the brief presented to this court had been submitted and read to that court.

The *amicus curiae* referred to in the report of the *Fixen* case is one of the counsel for appellants in this case, and a resort to the opinion in the *Fixen* case will show how that court regarded and disposed of his theories. In view, therefore, of the full and exhaustive treatment which the case presented herein has received at the hands of all the courts below, and in the belief that no better or more comprehensive briefs could be presented by us on this appeal than a collation of some of these cases, we have incorporated in an APPENDIX to this brief the full reports of the opinions in the following cases:

Columbus Electric Co. v. *Worden*, 99 Fed. Rep., 400.

In re Fixen, 102 Fed. Rep., 295.

In re Conhaim, 97 Fed. Rep., 923.
In re Wise, 2 N. B. N., 157.

The arguments of appellants' counsel being fully and completely met in the opinions contained in the cases printed in the appendix, we deem it unnecessary to attempt to controvert every one of the arguments or theories advanced in appellants' brief. There are some few points, however, in addition to what have already been raised and discussed in the cases in the appendix, to which we desire to call the court's attention, and we therefore do, as briefly as possible in the following pages, set forth our views in regard to those points.

I.

THE PHRASEOLOGY OF THE PROVISIONS OF THE BANKRUPTCY ACT IS PLAIN AND UNAMBIGUOUS—IT LEAVES NO ROOM FOR JUDICIAL CONSTRUCTION.

Section 57*g* of the act is as follows: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Section 60*a* reads: "A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60*b* reads: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the ad-

"judication, and the person receiving it, or to be benefited "thereby, or his agent acting therein, shall have had reason- "able cause to believe that it was intended thereby to give "a preference, it shall be voidable by the trustee, and he "may recover the property or its value from such person."

These sections are clear and unambiguous. By the first clause above cited Congress has declared that any creditor who has received a preference shall not be allowed to share in the distribution of the bankrupt's estate unless he shall surrender the preference.

Section 60*a* has the only definition of a preference contained in the act, and no other clause purports in any way to modify this definition. By this definition a preference is not made to depend neither upon the intent of the insolvent or upon the knowledge or belief of the creditor that a preference was intended. The transfer whether by way of payment or otherwise, the effect of which will be to enable any one of the creditors to obtain a greater percentage of his debt than other creditors in the same class, constitutes a preference. Effect alone is the dominant factor in determining whether a preference has been created or not. That a payment is a transfer within the purview of the act cannot be gainsaid. The definition of the ward "transfer" is given in Section 1 (25) as follows: "'Transfer' shall include "the sale and every other and different mode of disposing "of or parting with property, or the possession of property, "absolutely or conditionally, as a *payment*, pledge, mort- "gage, gift or security." That a transfer of money, in other words a payment, is a transfer of property, thus plainly appears. It is taxing credulity to the utmost to argue that Congress meant to interdict all preferential transfers of property, except money, and permit all payments of money no matter how fraudulent or preferential.

The language of these sections is susceptible of but one meaning. The intention of Congress as thereby expressed is clear, unequivocal and unambiguous. It would be difficult to employ language more plainly signifying that intent on the part of the debtor or knowledge on the part of the creditor is not an essential ingredient of a preference. The sole question is, does the payment have the *effect* of giving the payee a greater percentage of the insolvent's assets than other creditors of the same class. If this effect is produced, it is a preference, and the creditor will not be allowed to use the machinery of the bankruptcy court to obtain a dividend out of the bankrupt's estate, in addition. Section 60*b*, however, adds other and different circumstances to be proved to entitle one to the relief provided therein. It adds the increment of knowledge on the part of a creditor receiving a preference, that a preference was intended, as a condition precedent to a recovery by the trustee of the value of the preference. It makes a preference, received *with knowledge*, by the payee, that a preference is intended, recoverable by the trustee. There being not the slightest ambiguity it will not be necessary to resort to the rules of construction, for, as recently declared by this court, "the province of construction lies wholly within the domain of ambiguity." (*Hamilton* v. *Rathbone*, 175 U. S., 416-421.)

In all cases it must be assumed that words and phrases are used in their popular and common acceptation, and from this presumption it is not allowed to depart unless it clearly appears that such interpretation does not give the real intention of the legislature. Appellants urge with great earnestness that a literal reading of the above sections and the meaning given them by the numerous authorities lead to absurd results. This we strenuously deny. But, assuming, for ar-

gument's sake, that absurd results flow from a literal reading of the law, it by no means follows that the court in passing upon the law would have the power to disregard the plain, unambiguous wording of the act under consideration. Any departure from the undoubted interpretation of plain and unmistakable words would be an unjustifiable assumption of legislative power. When the language of an act is susceptible of but one meaning it must receive that meaning although such construction might lead to results which are absurd or mischievous. Courts are not to tamper with the clear and unequivocal meaning of the words, although the consequences may be such as were not contemplated by the legislature. There can be no departure from the plain meaning of a statute on grounds of unwisdom or of public policy.

Sedgwick on Statutes, 231.
Cooley on Const. Limitation (5th Ed.), 197.
U. S. v. *Fisher,* 2 Cranch., 399.
St. Paul Ry. Co. v. *Phelps,* 137 U. S., 528.

When the law is clear the judges should determine as the law is without regard to inequitableness. In the words of Lord BACON: "Judges ought to remember that their "office is *jus dicere* not *jus dare,* to interpret law, not to "make law."

If the meaning of the act is plain, it must be obeyed, even if great inconvenience might result from construction in conformity with the meaning.

U. S. v. *Fisher,* 2 Cranch., 385.

We agree with appellants that all laws should receive a sensible construction, and that the general treatment of a statute should be so limited in its application as not to lead to oppression, injustice or absurd consequences. It will, however, always be presumed that the legislature intended

exceptions to language which would avoid absurdities of this nature; moreover, the absurdity must be of such a *degree* that the action of the court in sanctioning an interpretation leading to absurd consequences must be stultifying. What this degree of absurdity is has been plainly expressed by this court in the following language of Chief Justice MARSHALL: "Before discussing this argument, it may not be improper "to premise that, although the spirit of an instrument, es- "pecially of a constitution, is to be respected not less than "its letter, yet the spirit is to be collected chiefly from its "words. It would be dangerous in the extreme to infer "from extrinsic circumstances that a case for which the "words of an instrument expressly provides shall be ex- "empted from its operation. Where words conflict with "each other, where the different clauses of an instrument "bear upon each other, and would be inconsistent unless the "natural and common import of words be varied, construc- "tion becomes necessary, and a departure from the obvious "meaning of words is justifiable. But if, in any case, the "plain meaning of a provision, not contradicted by any other "provision in the same instrument, is to be disregarded, be- "cause we believe the framers of that instrument could not "intend what they say, it must be one in which the absurdity "and injustice of applying the provisions of the case would "be so monstrous that all mankind would, without hesita- "tion, unite in rejecting the application."

Sturges v. *Crowninshield*, 4 Wheaton, 203.

"By the term 'absurdity' is meant that which is to be re- "garded as morally impossible; which is contrary to reason, "or in other words which could not be attributed to men in "their right senses."

Patten v. *Douglas Co.*, 87 Mo., 239.

This court has at various times given instances in which it will overlook the literal meaning of the terms of a statute although unambiguous, where such literal interpretation would lead to absurd and wholly unlooked for results. The leading case is *U. S.* v. *Kirby*, 7 Wallace, 482, in which this court passed upon an act of Congress which imposes a penalty upon any person who knowingly and willfully obstructs and retards the passage of the mail or its carrier.

Kirby and others were indicted for knowingly and willfully obstructing and retarding the passage of the mail and of the mail carrier. It appeared that one Farris, a mail carrier, was indicted for murder and that by order of the court, bench warrants were issued upon the indictment and placed in the hands of Kirby, who was then Sheriff, commanding him to arrest Farris and bring him before the court to answer the indictment; that under these warrants he arrested Farris; that Kirby and others entered a steamboat on which Farris was at that time a passenger and in charge of certain mail then in process of transportation, and the question under consideration by this court was whether Kirby had thereby violated the statute above referred to. The court held that to read the statute so as to make Kirby guilty of violating the same would lead to absurd results and that the legislature intended exceptions to its language which would avoid results of this character, and that the reason of the law in such a case should prevail over its letter. The court, among other things, says: "The common sense "of man approves the judgment mentioned by Puffendorf, "that the Bolognian law which enacted, 'that whoever drew "blood in the streets should be punished with the utmost "severity' did not extend to the surgeon who opens a vein "of a person that fell down in the street in a fit. The

"same common sense accepts the ruling, cited by Plowden, "that the statute of 1st Edw., II., which enacts that a prison- "er who breaks prison shall be guilty of felony, does not "extend to a prisoner who breaks out when the prison is on "fire—'for he is not to be hanged because he would not "stay to be burned.' And we think that a like common "sense will sanction the ruling we make, that the act of "Congress which punishes the obstruction or retarding of "the passage of the mail, or of its carrier, does not apply "to a case of temporary detention of the mail caused by the "arrest of the carrier upon an indictment for murder."

This case and the illustrations therein, tend to show the degree of absurdity which should warrant a court in disregarding the letter of the law and looking rather to its intent.

The cases of absurd results following a literal reading of statutes incorporated in appellant's brief are of this character. They do not apply to the case at bar.

From the rule that, where but one meaning can attach to the terms of a statute, there is no room for construction, it follows, that nothing can be added to or taken from the statute, unless to construe its words according to the obvious meaning would give rise to manifest inconsistency, incongruity or ambiguity. A court may insert limitations only as to special cases which fall within the scope of the general terms used in the statute.

U. S. v. *Coombs,* 12 Peters. U. S., 72.
Ogden v. *Strong,* 2 Payne U. S., 584.
McIver v. *Regan,* 2 Wheaton, 95.
Lake Co. v. *Rollins,* 130 U. S., 662.

Words may not be imported into a statute in order that it may include a case which has been omitted, merely because

there seems to be no good reason why it should be omitted and the omission seems to have been merely unintentional.

Dwarris Stat., 2d Ed., 579.

It is therefore only in cases where the words of a statute are capable of two meanings, or where, by giving them their literal interpretation the statute will be inconsistent or ambiguous, that the courts resort to the secondary rules of construction to aid in determining the real meaning of the legislature.

Denn v. *Reid,* 10 Peters, 524.

Priestman v. *U. S.,* 4 Dallas, 30.

Confining ourselves to the " four corners " of the act, the correctness of the construction placed by all the courts below upon the sections involved in this appeal will be made more apparent, and reference to other sections of the present bankruptcy act will give this court some assistance in determining the real meaning of the sections of the act at present under consideration. Section 3 reads as follows:

" Acts of Bankruptcy."

(*a*) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or, (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or, (4) made a general assignment for the

benefit of his creditors; or, (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

Section 65*d* provides: "Wherever a person shall have "been adjudged a bankrupt by a court without the United "States and also by a court of bankruptcy, creditors resid- "ing within the United States shall first be paid a dividend "equal to that received in the court without the United "States by other creditors, before creditors who have re- "ceived a dividend in such court shall be paid any amounts."

Section 65*e*. "A claimant shall not be entitled to col- "lect from a bankrupt estate any greater amount than shall "accrue pursuant to the provisions of this act."

67*f* provides: "That all levies, judgments, attachments "or other liens obtained through legal proceedings against "the person who is insolvent, at any time within four months "prior to the filing of a petition in bankruptcy against him, "shall be deemed null and void in case he is adjudged a "bankrupt, and the property affected by the levy, judgment, "attachment or other lien shall be deemed wholly discharged "and released from the same, and shall pass to the trustee "as a part of the estate of the bankrupt, unless the court "shall, on due notice, order that the right under such levy, "judgment, attachment or other lien shall be preserved for "the benefit of the estate; and thereupon the same may pass "to and shall be preserved by the trustee for the benefit of "the estate as aforesaid. And the court may order such "conveyance as shall be necessary to carry the purposes of "this section into effect: Provided, that nothing herein "contained shall have the effect to destroy or impair the title "obtained by such levy, judgment, attachment or other lien, "of a *bona fide* purchaser for value who shall have acquired "the same without notice or reasonable cause for inquiry."

It is most significant that Section 3, defining *acts of bankruptcy*, makes intent on the part of the debtor a necessary element. The present act, as well as prior bankruptcy acts, provides for two classes of bankrupts, voluntary and involuntary. In case of voluntary bankruptcy the aid of the law is invoked by the bankrupt himself with the purpose of being discharged from his debts as the principal motive; and of the other, the movement is made by his creditors for the purpose of securing the appropriation of his property to their payment, discharge being with them a matter of no weight, and often contested.

Wilson v. *City Bank*, 17 Wallace, 473-81.

"The reason for this wide difference in the proceedings "in the two cases is obvious enough. When a man is willing to refer his embarrassed condition to the proper courts "with a full surrender of his property, no harm can come "to any one but himself, and there can be no solid objection "to the course he pursues; but when a person wants to take "from another the control of his property, to arrest him in "the exercise of his occupation and to impair his standing "as a business man—in short, to place him in a position "which may ruin him in the midst of a prosperous career, "the precise circumstances or facts in which he is authorized to do this should not only be well defined by the law, "but clearly established in the court."

Wilson v. *Bank*, *supra*.

In other words, a person may be forced into involuntary bankruptcy on account of the *wilfull* acts performed by him, and for the reason that he *intended* to commit an act which would render him amenable to the stringent provisions of the bankruptcy act, he may be punished by being thrown into involuntary bankruptcy. Section 3 refers to *involuntary*

cases, and, therefore, it very justly makes *intent* a necessary element in the various causes which constitute acts of bankruptcy, but when once a person has been adjudicated a bankrupt, either on his own petition in voluntary proceedings, or as the result of involuntary proceedings, the great cardinal purpose of the bankruptcy act, to-wit, the ratable and equitable distribution of the bankrupt's assets among all his creditors, must be held in view and that purpose must be carried out without regard to intent.

Sections 57*g* and 60*a* of the act apply to cases of both voluntary and the involuntary bankruptcy. They have reference merely to the mode of distribution of the bankrupt's estate, and designate the persons entitled to share in such distribution. Intent plays no part in this distribution, as has been clearly shown in the reported cases to which we have referred. In arriving at a determination of the persons entitled to share in the distribution of the bankrupt's estate, and in considering what are the effects of payments or transfers claimed to be preferences, *intent* has been wholly eliminated, and the *effect* merely of transfer or payment is the only matter to be taken into consideration.

Preferences are thus treated by the present bankruptcy act under three conditions definitely distinguished. First, under 3*a* (2), as *an act of bankruptcy*, intent to give a preference must exist, and properly so, for no man should be punished by being compelled to surrender dominion of his property which the common law vouchsafes to him unless he has committed an act willfully.

Secondly, 57*g*, determines the mode of distribution of the bankrupt's assets, and the persons among whom this distribution should take place, and intent is not necessary,

for the effect of a preference is the only thing which ought to be regarded, it therefore very naturally disassociates the idea of intent from that of preference.

Thirdly, 60*b* provides no creditor should be compelled to surrender that which he has received in good faith unless knowledge or intent that a preference was intended should be found to exist. The effect of the interpretations placed upon these provisions of the act by all of the courts below so far from being absurd or mischievous in results, are, in our opinion, most consonant with equity and fair dealing. The three distinctions above pointed out stand out in clear and bold relief. Under their terms it is necessary to show that the debtor intended to give a preference, but it is not necessary to show that a creditor has reasonable cause to believe it was so intended. Again, a preferential transfer may be sufficient to make the transferor a bankrupt, although not of such a character that the trustee may recover it back.

Re Drummond, Fed. Cases, 4093.

Re Oregon, Bull & Prent. Co., 13 N. B. R., 503-514.

Loveland on Bankruptcy, Sec. 52.

So far as Section 60*a* is concerned, the intent of the debtor, and the knowledge of the creditor, are alike immaterial. If the bankrupt is insolvent, then any payment made by him whether in the ordinary course of business, or otherwise, on account of his indebtedness, must operate to enable the payee to obtain a greater percentage of his debt than others of the same class, on account of whose indebtedness nothing has been paid. Whether such payment has been made in the usual course of business or not is immaterial so far as Section 60*a* is concerned, because it can only bear on the question of intent and knowledge of the

parties; and the question of knowledge and intent are, as we claim, wholly immaterial, except under Section 3*a* (2) and 60*b*.

There can exist no doubt or misgiving as to the meaning and plain applicability of these subdivisions. No necessity exists for reading into these sections any additional words or for ascribing to them a meaning which the words do not import. Appellants are endeavoring in this appeal to have this court interpolate into Section 57*g* an additional phrase, so as to make this section read: "The claims of creditors who "have received preferences *voidable under Section 60b* "shall not be allowed, etc." It is fair to assume that if Congress had intended to exclude only preferences received with knowledge it would have so worded that section.

A recapitulation of all of the sections above quoted would make the act read as follows:

1. Section 3*a* (2) says to the *debtor*, "if you have will- "fully and *with intent* committed an act the effect whereof "would be to give a preference to one of your creditors, "you have committed an act of bankruptcy, the penalty of "which is your liability to be thrown into involuntary bank- "ruptcy."

2. Section 57*g* says to the *creditor*, "you may prove "your claim against the estate if you have not received a "preference and if you have received a preference you may "prove your claim on condition that you surrender the pre- "ference."

3. Section 60*a* says to the *debtor and creditor*, "if the "*effect* of a transfer or payment by the insolvent debtor is "that one creditor has received a greater percentage than "other creditors of the same class, such transfer or pay- "ment shall be a preference."

4. Section 60*b* says to the *creditor,* "if you "received a preference within four months before the filing "of the petition in bankruptcy, and you have reasonable "cause to believe that a preference was intended, the trus- "tee of the bankrupt's estate may compel you to return the "value of the preference."

5. Section 65*d* says to the creditor, "if you have re- "ceived from the estate of the bankrupt, administered out- "side of the United States, any dividend on your claim, you "shall not participate in the bankrupt's estate until all cred- "itors residing in the United States have received a like "dividend on their claims."

6. Section 65*e* says to the creditor, "you shall not col- "lect from the bankrupt estate any greater amount than "would accrue to you pursuant to the provisions of the bank- "rupt act.'

7. Section 67*f* says to the creditor, "if you have obtained "a lien through judicial proceedings against a bankrupt "at any time within four months prior to the filing of the "petition against him, such lien is a nullity and will be "either disregarded or set aside by the court."

The foregoing recapitulation we have taken from a brief in a case involving the same question presented to the Circuit Court of Appeals by eminent St. Louis attorneys.

In but two of the clauses above set forth does the act provide for the necessity of the intent or knowledge, 1 and 4. In the other cases there is no necessity of proving either intent or knowledge. In the light of the provisions above set forth, can it be said, either that ambiguity exists or that the interpretation arrived at will lead to absurd results. We close this branch of the discussion with a citation from the language of Mr. Justice BREWER: "The primary

"and general rule of statutory construction is that the in-
"tent of the law-maker is to be found in the language that
"he has used. He is presumed to know the meaning of
"words and the rules of grammar. The courts have no
"function of legislation and simply seek to ascertain the
"will of the legislature. It is true that there are cases in
"which the letter of the statute is not deemed controlling,
"*but the cases are few and exceptional*, and only arise when
"there are cogent reasons for believing that the letter does
"not fully and accurately disclose the intent. No mere
"omission, no mere failure to provide for contingencies,
"which it may seem wise to have specifically provided for,
"justify any judicial addition to the language of the statute.
"In the case at bar the omission to make specific provision
"for the time of payment does not offend the moral sense.
"* * * Certainly there is nothing which imperatively
"requires the court to supply an omission in the statute,
"or to hold that Congress must have intended to do that
"which it failed to do."

U. S. v. *Goldenberg*, 168 U. S., 95-103.

II.

THE RULES OF CONSTRUCTION FAVOR THE INTERPRETATION ADOPTED BY THE COURT BELOW.

But if this court should be of the opinion that the sections of the act in question are not unambiguous, or that a literal interpretation leads to absurd and mischievous results, and in consequence thereof resort must be had to the rules of interpretation and construction, we find ourselves confronted by the following canons of construction.

First. In arriving at the intent of the law-makers statutes in *pari materia* may be referred to.

Second. The legislative purpose and object aimed at ought to be borne in mind, and language susceptible of more than one construction is to receive that which will bring it into harmony with such object and purpose rather than that which will tend to defeat them.

Third. Courts in construing a statute may with propriety regard the history of the times when it was passed and the general state of opinion, public, judicial and legislative, at the time of the enactment.

One of the chief canons of interpretation and construction of statutes is that referring to the intent of the legislative body in enacting the statute. Statutes in *pari materia* may be referred to on the question of intent. Not only may be contemporaneous and prior statutes be considered in construing a given act, but a subsequent statute may often aid in the interpretation of a prior one. Expired and repealed acts in *pari materia* with the statute to be construed may also be considered in the interpretation thereof.

"All acts in *pari materia*" says Lord Mansfield, "are to "be taken together as if they were one law. Where there "are different statutes in *pari materia*, though made at dif- "ferent times or even expired and not referring to each other, "they shall be taken and construed together as one system "and as explanatory of each other."

Sedgwick Stat. Law, 247.

"The rule that statutes in *pari materia* are to be con- "sulted for the construction of each other holds good, though "some of the statutes may have expired or even been re- "pealed, and whether they are referred to or not. All "acts which relate to the same subject," says Lord Mansfield, "notwithstanding some of them have expired or are

"not referred to must be taken to be one system and con-
"strued consistently."

Sedgwick Stat. Law, 250.

Proceeding a degree further we find the law to be that where a comparison between two statutes in *pari materia* shows that there exists a difference *in substance* between a prior statute, *although repealed*, and the new statute on the same subject, there arises the presumption that the change was intentional, and that the omission of the word in the earlier and repealed statute signifies a deliberate intent on the part of the law-makers to exclude all idea conveyed by the words omitted from the new or re-enacted statute. In the amendment, re-enactment or revision of a statute a mere change of phraseology works no change unless it clearly appears that such was the intention of the legislature, nor will the omission of a material word in the amendment, re-enactment or revision of the statute change the law unless such be the evident intent of the legislature, but a *deliberate or material change of expression* must be taken *prima facie* to import *a change of intention*, and where the omission of material parts indicates a change of law effect must be given to such intent.

23d Am. and Eng. Encl. of Law, 372, 373, 374 and numerous cases cited in note.

This court, very recently, in construing various sections of the present bankruptcy act, having this rule of construction in view, held that the omission from the present act of certain provisions referring to the same subject-matter which existed in the Acts of 1841 and 1867, indicated the intention of Congress not to retain those omitted provisions. The court said: "The Bankruptcy Acts of 1867 and 1841,

"as has been seen, each contained a provision conferring, "in the clearest terms, on the Circuit Court and the Dis- "trict courts of the United States concurrent jurisdiction of "suits at law or in equity betwen the assignee in bankruptcy "and an adverse claimant of property of the bankrupt. We "find it impossible to infer that when Congress, in framing "the Act of 1898, entirely omitted any similar provision, "and substituted the restricted provisions of Section 23, "it intended that either of those courts should retain the "jurisdiction which it had under the obsolete provision of "the earlier acts."

Bardes v. *First Natl. Bank of Hawarden*, 178 U. S., 524-537.

In the matter of *Jacob Hirsch*, 96 Fed. Rep., 468-477, District Judge HAMMOND says: "The Act of 1898 does "not use the words: 'in contemplation of insolvency,' a "phrase found in the Act of 1867 and the omission of the "word 'insolvency' is therefore quite significant."

From the principles above stated, we now venture to draw the conclusions applicable to the sections of the present bankruptcy act now under discussion. Compare Section 57*g* "the "claims of creditors who have received preferences shall "not be allowed, unless such creditors shall surrender their "preferences," with the analogous provision in the Bankruptcy Act of 1867 (Rev. Stat., 5084, Section 23), reading: "Any person who * * * has accepted "any preference *having reasonable cause to believe that the "same was made or given by the debtor* contrary to any "provision of the act, March 2, 1869, Chap. 176, * * * "shall not prove the debt or claim on account of which the "preference is given, nor shall he receive any dividend "therefrom until he shall first surrender to the assignee

"the property, money, benefit or advantage received by him "under such preference."

The elision from the Act of 1898 of all that part of Section 5084, making "reasonable cause to believe, that a preference was intended," a bar to the right of a creditor to participate in the estate of the bankrupt is more than "quite significant." A material change in the language of the statute must be presumed to signify what the changed language imports—a changed purpose. Congress certainly had before it this provision of the prior act when it enacted Section 57*g*, and this material change must be taken *prima facie* to import the intention of Congress to change the whole law in this particular. Congress therefore by divorcing intent from the creditors' relation to an act creating a preference did in effect declare that knowledge on the part of the creditor in receiving a payment or transfer, that such payment or transfer was a preference, is no longer necessary. It discarded the requirement of knowledge on the part of the creditor in order to create a payment or transfer a preference. Such being the necessary effect of this change of phraseology, it is the duty of the courts to give effect to this intention.

The omission of intent in the creation of a preference, which would debar a creditor from proving his claim, is also shown by a comparison of Section 60 of the bill, as originally introduced, where intent was made essential to create a preference, with Section 60 of the act as passed, in which only the effect of the act complained of is made the test.

Paragraph 60*a*, before it was finally amended, read:

"Section 60*a*. A person shall be deemed to have "given a preference if, being insolvent or in contemplation

" of insolvency or bankruptcy, he has procured or suffered " a judgment to be entered against himself in favor of any " person, or made a transfer of any of his property *with in-" tent (1) to defeat the operation of this act; or, (2)* to en-" able any one of his creditors to obtain a greater percentage " of his debt than any other of such creditors of the same " class." (Senate bill, 1035.) Section 60*a* as passed reads: " A person shall be deemed to have given a preference if, be-" ing insolvent, he has procured or suffered a judgment to be " entered against himself in favor of any person, or made a " transfer of any of his property, and the effect of the " enforcement of such judgment or transfer will be to en-" able any one of his creditors to obtain a greater percent-" age of his debts than any other of such creditors of the " same class." It appears by a comparison between these two sections that the words " *in contemplation of insolv-" ency or bankruptcy,*" and " *with intent (1) to defeat the " operation of this act; or (2)* " were stricken out of the former paragraph, and the words " and the effect of the " enforcement of such judgment and transfer will be " inserted.

Section 57*g* as first introduced by Senator Lindsay (Senate Bill No. 1035, introduced by Senator Lindsay March 22, 1897), read as follows: " A creditor who has received " a preference *and shall have had reasonable cause to be-" lieve that it was thereby intended by the debtor to give " him a preference* shall not be allowed to prove his claim " unless he shall surrender such preference." In the bill as passed the words in italics do not appear.

" When a former act contains an express exception, and " the first drafts of a later act relating to the same subject " contain the same exception, and this exception is omitted " from the act as finally enacted, and other provisions in

"the act are made to conform with this change, we cannot "but conclude that Congress intended to make the change, "and the courts should not seek to render it nugatory by "a forced construction."

U. S. Circuit Court of Appeals, First Circuit,
Re Marshall Paper Co., 102 Fed. Rep., 872.

Mr. Referee HOTCHKISS (*in re Meyers*, 1 N. B. N., 208), in discussing this phase of the question, said: "It would "be ridiculous to assume that Congress intended to con- "tinue the necessity of showing intent and active agency "as elements of proof in a case like that at bar in the face "of the fact that that body eliminated from a bill before "them the very words which made such proofs necessary."

It is interesting to note the change of heart evidently experienced by Referee Hotchkiss since he wrote the opinion *in re Meyers*. Compare the above utterance with his subsequent opinion *in re Hall*, part of which is incorporated in appellants' brief at page 70.

The foregoing furnishes proof conclusive that the interpretation given by the courts below to these sections is consistent with the intent of the law makers not only by the language of the act itself, but by the action of Congress in the deliberate excision from the old act and from the bills first introduced of all words showing intent.

The construction, moreover, almost uniformly given to these sections of the act is in perfect accord with the spirit and intent of the act.

The cardinal purposes of the Bankrupt Act is (*a*) to procure a rateable distribution of a bankrupt's assets among his creditors; and, (*b*) to discharge the insolvent from his debts.

Wilson v. *Bank, supra.*
Re Scrofford, 4 Dillon, 376.

The effect aimed at by the Bankruptcy Act is naturally the prevention of preferences; the only way in which to secure an equitable distribution of a bankrupt's property among his creditors is to exclude those creditors who have received preferences. After the repeal of the last Bankrupt Act in 1879 and before the present act was placed upon the statute books, the division of an insolvent's assets among a favored few and the giving of preferences to the exclusion and at the cost of other creditors having equally meritorious claims, constituted an evil which in the absence of a bankruptcy law, could not be remedied. In the language of the Supreme Court of Illinois:

"The right to prefer creditors is an infirmity still re-
"maining in the body of the common law. It is contrary to
"the letter and spirit of the maxim that equality is equity.
"It is condemned in all our state insolvent laws. The Fed-
"eral bankrupt laws have never omitted to annex penalties
"to its exercise. It makes our law in relation to voluntary
"assignments a poor, lame piece of legislative work, in-
"tended only for debtors who desire to deal fairly with
"their creditors. It is the result, very often, not of the
"voluntary choice of debtors already weak and discouraged,
"but of persistent and harassing importunities or of flat-
"tering promises which often amount to fraudulent bar-
"gains."

Butler Paper Co. v. *Robbins,* 151 Ill., 588-632.

Despite the general sentiment that where a number of creditors alike extend purely personal credit to the debtor, neither demanding nor receiving security at the time of giving credit, every dictate of justice and fair dealing requires that when the debtor becomes insolvent, creditors standing as they do on the same footing, should share alike in the

distribution of his property. Although it was universally conceded that no condition of the law acted more unjustly or was more demoralizing than one which tolerates preferences, the making of preferences went on. This laxity in the law was injurious to credit, because it ever produced a feeling of insecurity and added to what might be termed the ordinary risks of business an arbitrary hazard. This permissive right allowed by the courts was a strong incentive to fraud, besides resulting in the most wanton waste, because of the incessant and constant struggles for advantage which it promoted. What was styled the "race of diligence," receiving not only the sanction, but the fullest approval of the courts, practically was robbing Peter to pay Paul. It is not to be wondered at, therefore, that Congress awoke from its twenty years' slumber, and realizing that preferences were evils which had to be corrected, enacted a measure, *remedial* in its nature, the main purpose whereof was to compel an insolvent debtor to distribute his estate equally among his creditors. A construction of the various parts of the Bankrupt Act in accord with the views of all of the courts below, is but a step in the direction of attaining the manifest objects and purposes of the act.

Should the construction contended for by appellants prevail, the main purpose of the act would be defeated. An insolvent could practically, on the eve of bankruptcy, under the aegis of the law, divide the bulk of his assets among his favorite creditors, by making payments to them ostensibly in the regular course of business. The bankrupt having thus exercised a *delectus personarum*, the trustee would be absolutely prevented, not only from recovering these payments, in absence of proof of knowledge on the creditor's part, of the debtor's intent to prefer, but he would be obliged to allow them to participate in a distribution of the

bankrupt's effects, in common with such other creditors as had received no part of their claims.

Should, however, the prevailing view be approved by this court, the mischiefs sought to be suppressed by the passage of the Bankrupt Act will be greatly lessened. The act is most remedial in its nature. Remedial statutes being made to supply defects or abridge superfluities in the law, that construction which tends to suppress the mischief or advances the remedy should be favored. In construing a statute of like nature, there must always be kept in view the old law, the mischief and the remedy.

Heydon's Case, 3 Rep., 7*b*.
Plowd., 205.
Co. Litt., 11, 42.
Van Horne v. *Dorance*, 2 Dall., 316.

And courts, within certain prescribed limits, have even declared that that which is within the mischief intended to be remedied is considered within the statute, though not within the letter thereof, and that which is not within the mischief is not within the statute, though within the letter.

Eyston v. *Studd*, 2 Plowd., 464.
State v. *Canton*, 43 Mo., 48.
People v. *Lacombe*, 99 N. Y., 49.
U. S. v. *Freeman*, 3 How. (U. S.), 565.

We here call the court's attention to a patent inconsistency in appellant's brief. It is argued therein, first, that bankrupt acts are *remedial*, and must be liberally construed to effect their objects and purposes. (Appellant's brief, page 7.) But at pages 22 and 23 of appellant's brief counsel base their arguments that the act should receive a strict construction, upon the ground that it is of a *penal nature*. As a

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foundation for this argument they cite *In re* Eggert, 2 N. B. N., 185, in which Mr. Referee Jones has stated "this "section is in the nature of a penal statute, and should be "strictly construed." A reference to this case will show that Mr. Jones was discussing, not Section 57*g* or Section 60*a*, but Section 60*b*. The question involved in that case was whether an assignment of a claim against the City of Milwaukee, made by the bankrupt to a creditor, was received by the creditor with knowledge of the fact that a preference was intended, and, consequently, whether the proceeds of this claim so assigned belonged to the bankrupt estate, or to the creditor to whom the assignment had been made. The trustee maintained that the creditor had received this assignment with knowledge on his part that at the time it was made a preference was intended, and that under *Section 60b* the assignment was voidable. It is upon this ruling of Referee Jones that appellants base their argument that the provisions under discussion are penal and must be strictly construed. The *same Referee*, in construing Section 57*g*, in connection with 60*a* says:

"This section (57) of the act was not intended to im-
"pose a penalty but simply to give creditors who receive
"preference options to keep what they have received and take
"no dividends from the estate, or to surrender their prefer-
"ence and share equally with other creditors in the general
"distribution *In re* Conhaim, 97 Fed. Rep., 923. Equal-
"ity is equity, and I see no reason why one creditor should
"receive more from the estate of a bankrupt than another
"creditor, after the debtor becomes insolvent and within
"four months prior to his bankruptcy."

The case of *Conhaim*, 97 Fed. Rep., 923, referred to in the Referee's opinion, is one of the cases incorporated in the appendix to this brief.

We do not think it necessary to consider seriously the illustrations or the suppositious cases in appellants' brief, tending to show hardships likely in appellants' opinion to ensue should the construction heretofore placed upon the act prevail. We have shown that not only does there exist no reason for departing from the strict letter of the law, but that every dictate of equality and justice sanctions the interpretation we contend for. The Bankrupt Act may work hardships in individual cases, but when courts undertake to make law for "hard cases" they pass out of their proper sphere. Courts cannot undertake to add provisions not found in the statutes for the purpose of preventing an apparent hardship.

Comrs. of Laramie Co. v. *Comrs. of Albany Co.*, 92 U. S., 307-314.
Cooke v. *School District*, 12 Colo., 458.
Cheyenne Co. v. *Bent Co.*, 15 Colo., 320-326.

The illustrations, again, may afford reasons for amending or repealing the act and for that reason may properly be addressed to Congress. But "*Lex ita scripta est,*" and the court should be loth to change the law.

We take exception to the oft-repeated charge made by appellants, that the reading of the act, as construed, works hardships, imposes penalties, and unsettles business. The entire act, in a measure, does unsettle business, in that by an adjudication in bankruptcy a creditor, theretofore considered solvent, evades liabilities to his creditors, and that consequently claims considered as good and valuable assets on the creditors' books turn out to be comparatively worthless. But this affords no reason for an arraignment of the act.

Again, a person who has innocently received a preference, is under no obligation to surrender that which he has re-

ceived. He may retain it, or he may surrender the same and receive his dividend. The question of surrender under 57*g* is entirely voluntary and optional with the creditor, who can determine whether it is worth his while, in view of future dividends, to surrender his preference or not. Nor can it be claimed that the value of the unpaid portion of the credit is unduly unsettled. The debtor being insolvent, the account is not properly entitled to reliance as an asset or basis for future recovery. From the moment of actual insolvency all creditors become entitled to share *pro rata* in the estate because it represents the credit given the insolvent by his creditors and in good morals belongs to them and not to him.

Referee Waite in

Re Knost et al., 1 N. B. N., 403.

And it is certainly not inequitable to require one who has received an undue portion of that estate, no matter if innocently, to surrender that advantage before participating in further distributions of it with those who have not received such preference.

Collier on Bktcy. (1st Ed.), 286.

Briefly, the rulings on these points follow the maxim that "equity delights in equality." We forbear to further discuss this point because it is fully treated of in the cases printed in the appendix.

An excellent illustration of the workings of the sections under discussion on this appeal, is the following from the pen of Harold Remington, Referee:

"Unless we take the point of view taken by the Bank-
"ruptcy Act itself, we cannot, of course, hope to arrive at
"a correct interpretation of its provisions. It casts aside,
"apparently without hesistation, one of the cardinal princi-

"ples of Anglo-Saxon common law, namely, that the law "favors the diligent creditor; and it adopts in its stead "the equitable principle that equality is equity, and that "he that asks equity must do equity. It is as if a company "were invited to sit down to a meagre meal. The common "law says, seize what you can as quickly as you can, even if "nothing is left for the others. Bankruptcy law says, there "is little enough at best, but let all sit down and eat quietly "together, each taking his proper share. Not unfairly stated, "these are the respective attitudes of these two great opposite "systems of jurisprudence that have at different times gov-"erned our commercial and business world."

"Adopting, then, the point of view of the Bankruptcy "Act itself, it appears to be perfectly in accord with the "spirit of the law as well as its letter, to hold, as is held by "the decision of the Circuit Court of Appeals, just men-"tioned, that it makes no difference whether one knowingly "or innocently has received a preference over his fellows; "he must put it back if he would share in the estate."

Counsel for appellants have cited from the speeches of members of the Congress made while this act was under consideration by that body, and urge that this court should give that construction to the act which was contended for in the speeches.

This court has very recently, in conformity with its earlier rulings, declared that what individual senators or representatives have urged in debate, in regard to a proposed bill or resolution, does not furnish a firm ground for its application, nor is it important as explanatory of the grounds upon which the members voted in adopting it.

Maxwell v. *Dow*, 176 U. S., 581-601.

Citing:

U. S. v. *Trans-Missouri Freight Assn.*, 166 U. S., 290.

Dunlap v. *United States*, 173 U. S., 65.

It seems, moreover, that these speeches referred to the bills in the original form in which it was introduced, and before it was amended. As we have shown, *supra*, the bill, as first introduced, made both intent and knowledge essential requirements of a preference. These features are not present in the act as passed.

In answer to appellants' arguments that the construction urged by appellees will tend to disturb business relations and gives undue advantage to the creditor who has, without knowledge of his debtor's insolvency, received payment in full of his claim, we adopt the following remarks of Referee Coles:

"In the present case it is very earnestly urged that the "construction placed upon the statute by the authorities "just cited ought not to be adopted, because such construc- "tion will prove in practice intolerably disturbing to busi- "ness, and will bring about results that are unjust to cred- "itors who have received payments in the ordinary course "of business. I do not believe that the construction put up- "on the statute in the cases mentioned will, in point of fact, "occasion the inconvenient and inequitable results asserted. "Under the terms of the act (Sec. 60*b*) payments received "by a creditor in good faith and without knowledge or rea- "sonable cause to believe that the debtor intended to give "a preference, are absolute, and are not subject to be avoid- "ed by the trustee, against the will of the creditor. If the "law were otherwise, it would no doubt prove a serious "hindrance to business. But in making the creditor secure "with respect to payments received by him innocently and

" without knowledge of the debtor's insolvency, the law has " done all that considerations of policy or convenience seem " to demand. There appears to be no sound reason why a " creditor, who has received an undue proportion of the " insolvent estate, should be permitted to share in the dis- " tribution of the remainder, on a perfect equality with other " creditors who have not been similarly favored. On the " contrary, since the principal end of the Bankruptcy Law " is to effect an even-handed division of the estate among " creditors, it seems most consonant with the cardinal pur- " poses of the act to marshal the assets and distribute the " estate upon the just principle that 'he who asks equity " must do equity.' If a particular creditor has in fact re- " ceived a preference, it is immaterial so far as the conse- " quences to other creditors are concerned, whether he re- " ceived it ignorantly or intentionally. In either case it " results in an inequitable division of the insolvent estate. " The knowledge, intent or other emotions of the preferred " creditor are, in the present instance, entirely unimportant, " the only fact of real importance being the creditor's act " and its effect. The rights of a creditor who has received " a preference are carefully guarded by the statute. If " such creditor has altered his position for the worse in re- " liance upon the preference given him, he is to that extent " excused from making restoration. (Sec. 60*c*.) The right " of election which the statute gives him—to surrender the " preference and prove his claim or to retain the preference " —places him in a position where he can always secure his " ratable proportion of the estate.

" It is further insisted that the construction here given " the statute is unjust and unreasonable because it compels " a creditor who has received a partial payment to surrender " such payment before proving his claim, while a creditor

"who has been paid in full is under no obligation to restore "anything. The fact that these consequences result from "the construction placed upon the statute affords, in my "opinion, no sufficient reason for altering that construction. "All laws are in the nature of a compromise between ab- "stract justice and practical expediency. It is entirely im- "practicable and inexpedient to compel restoration on the "part of a creditor who has been paid in full and who has "accepted such payment without knowledge of his debtor's "insolvency. The transaction is closed and considerations "of policy forbid its being re-opened. For these reasons, "the Bankruptcy Law can not make a division of the estate "that is perfectly equal from the point of view of abstract "justice; but with respect to the property actually in hand "for distribution, and as between the creditors entitled to "share in such distribution, the doctrine here applied works "out the highest equity."

In the matter of Siegel-Hillman Co., Bankrupt, 2 Natl. Banqruptcy News and Reports, 933 (937-938).

The cases incorporated in the appendix to this brief, to which we again refer, fully controvert all other arguments of counsel not specifically treated by us.

Second.

THE COURT WAS POSSESSED OF THE POWER TO REQUIRE APPELLANTS TO REPAY THE DIVIDEND RECEIVED BY THEM IN THE BANKRUPTCY PROCEEDINGS, WITHOUT RESORT TO A SEPARATE SUIT.

The second point presented to this court for determination is the correctness of the ruling of the court below in directing appellants to return and repay to the trustee the divi-

dends theretofore received by them. The facts are as follows: At the first meeting of the creditors in the matter of Frank Brothers, bankrupts, to-wit: on March 17, 1899, appellants duly filed their claim against the bankrupt's estate for the sum of $3,093.98 which claim was at that time, no one objecting, allowed in full; thereafter, on April 28, 1899, a dividend of 15 per cent. was declared upon all claims allowed, including appellants' claim, and appellants thereafter received from the trustees their dividend amounting to $464.10. (Rec., 19.) On May 19, 1899, appellee filed with the referee a petition for a reconsideration and rejection of appellants' claim, and in that petition prayed, among other things, for the return of the dividend paid to appellants. The appellants answered said petition and the issue raised by such petition and answer having come on for hearing before the referee, the referee made an order rejecting and expunging appellants' claim and requiring appellants to repay to the trustee the amount of the dividend so received by them. In this order or decree the referee specifically decides, "that this court (District Court) in this proceeding "has the power and authority to order, require and compel "said claimants to repay to said trustee the amount of the "dividend received by said claimants." (Rec., 12-13.) This order and decree of the referee was affirmed by the District Court, and the judgment of the District Court was affirmed by the Circuit Court of Appeals.

Appellants assign as error, that the District Court had no authority to require them in the proceedings brought by appellee to reconsider and expunge the claim, to repay the dividend in question, and claim that the referee's powers were limited merely to reconsidering and rejecting the claim; that although the act requires a creditor who has received a dividend and whose claim has thereafter

been rejected and expunged, to repay the amount of dividend so received by him from the trustee, the only remedy which the trustee has to recover this dividend is by an independent suit against them. It is our contention, on the other hand, that the District Court has the power, after reconsideration and rejection of the claim on which a dividend has been paid, to require the creditor whose claim has been rejected, to repay the dividend received by him in the same proceedings brought to reconsider and reject the claim, and that the trustee need not resort to such independent suit to obtain relief. This is apparent from the reading of the following provisions of the act:

"Sec. 57. PROOF AND ALLOWANCE OF CLAIMS—*a* Proof "of claims shall consist of a statement under oath, in writ- "ing, signed by a creditor setting forth the claim, the con- "sideration therefor, and whether any, and, if so what, se- "curities are held therefor, and whether any, and, if so "what, payments have been made thereon; and that the "sum claimed is justly owing from the bankrupt to the "creditor."

"*d* Claims which have been duly proved shall be al- "lowed, upon receipt by or upon presentation to the court, "unless objection to their allowance shall be made by par- "ties in interest, or their consideration be continued for "cause by the court upon its own motion.

"*f* Objections to claims shall be heard and determined "as soon as the convenience of the court and the best inter- "ests of the estate and the claimants will permit..

"*k* Claims which have been allowed may be reconsidered "for cause and re-allowed or rejected in whole or in part "according to the equities of the case, before but not after "the estate has been closed.

"*l* *Whenever a claim shall have been reconsidered and* "*rejected* in whole or in part upon which a dividend has "been paid, *the trustee may recover from the creditor the* "*amount of the dividend received upon the claim if rejected* "in whole, or the proportional part thereof if rejected only "in part.

"*n* Claims shall not be proved against a bankrupt es- "tate subsequent to one year after the adjudication,or if they "are liquidated by litigation and the final judgment there- "in is rendered within thirty days before or after the expir- "ation of such time, then within sixty days after the ren- "dition of such judgment, provided, that the right of in- "fants and insane persons without guardians, without no- "tice of the proceedings, may continue six months longer."

Sec. 2. "That the courts of bankruptcy * * * are "hereby invested * * * with such jurisdiction at law "and in equity as will enable them to exercise original juris- "diction in bankruptcy proceedings * * * to (2) re- "consider allowed or disallowed claims (7) cause the es- "tates of bankrupts to be collected, reduced to money and "distributed, and determine controversies in relation there- "to, except as herein otherwise provided. (15) Make such "orders, issue such process and enter such judgments in "addition to those specifically provided for, as may be ne- "cessary for the enforcement of the provisions of this act."

In the first place, it is obvious that under the power conferred by Section 2 (7) the bankruptcy court may determine controversies arising over the reconsideration and rejection of allowed claims, and under subdivision (15) in amplification of such powers may make all orders, issue such process and enter such judgments as may be requisite to make such powers effective. It should be observed that subdivi-

sion (7) clothes the court with power to determine controversies "except as herein otherwise provided." The only limitation found in the act upon this power to determine controversies in relation to bankrupt estates, is contained in Section 23(*b*) (quoted below) which provides that suits by trustees shall be prosecuted only in those courts where the bankrupt might have brought the suit. This court, in construing Section 23(*b*) has held that such suits, unless by consent, must ordinarily be brought in the state courts. (*Bardes* v. *Bank*, 178 U. S., 524.) As we shall show, a proceeding to compel a creditor to refund a dividend received by him, is not a suit in the purview of Section 23 (*b*), and not being within the exception stated in that section, the bankruptcy court may determine the controversy and "make such order, "issue such process and enter such judgment as shall be "necessary to carry with effect the provisions of Section "57*l*," and the order made by the Referee herein requiring appellants to repay the dividend is such order and judgment.

The filing of a claim by a creditor in bankrupt proceedings and the allowance thereof is a judicial proceeding; the creditor stands before the court in the attitude of a plaintiff invoking its jurisdiction, and ample provision is made for adjudication and determination of this claim in the bankruptcy court. Any interested party may file exceptions to the claim and an issue is thereby raised; should no objection to a claim be filed the claim filed is allowed, and should the exceptions to the claim be overruled, the claim is likewise allowed.

This allowance of a claim has all the force and attributes of a judgment with the single distinction that it is a judgment in *rem* only; in fact, the act itself designates such al-

lowance as a judgment, for Section 25 provides, "that ap-
"peals, as in equity cases, may be taken in bankruptcy pro-
"ceedings from the courts of bankruptcy to the Circuit Court
"of Appeals of the United States, and to the Supreme Court
"of the territories in the following cases, to wit: * * *
"(3) From a *judgment* allowing or rejecting a debt or
"claim of $500 or over, such appeals shall be taken within
"ten days after the *judgment* appealed from has been
"rendered and may be heard and determined by the Appel-
"late Court in term or vacation as the case may be."

It should be borne in mind that a creditor is not compelled to prove his claim against a bankrupt estate. It is purely a matter of choice with him, but by proving his claim he voluntarily sumbits to the jurisdiction of the court, and he is in court to all intents and purposes, subject to all the provisions and limitations contained in the act. He knows, or the law presumes that he knows, that the allowance of his claim is subject to its reconsideration and possible rejection in whole or in part, and that in case of such rejection he may be required under Section 56*l* to repay to the trustee a part or whole, as the case may be, of any dividend he may have received. Under Section 60*k* a reconsideration of his claim may be had at any time before the estate is closed. The creditor, therefore, who proves his claim is in every respect a party to the proceedings, subject to the order of the court, and amenable to its processes.

This has been tersely expressed by this court as follows:

"Every person submitting himself to the jurisdiction of
"the bankrupt court in the progress of the cause, for the
"purpose of having his rights in the estate determined,
"*makes himself a party to the suit,* and is bound by what
"is judicially determined in the legitimate course of the
"proceeding. A creditor who offers proof of his claim, and

"demands its allowance, *subjects himself to the dominion "of the court, and must abide the consequences.* His reme- "dies for the purpose of this proof are prescribed by the "law."

Wiswall et al. v. *Campbell et al.*, 93 U. S. Rep., 347 (351).

When a creditor, therefore, after proving his claim, receives a dividend, the payment of this dividend is conditional only, subject to the power of the bankruptcy court to consider and reject his claim, and to order him to refund the dividend so received by him. From the time of the filing of his claim until the final closing of the estate the creditor is in court.

Appellants invoke Section 23*b* of the act providing "that "suits by the trustee shall only be brought or prosecuted in "the courts where the bankrupt whose estate is being admin- "istered by such trustee might have brought or prosecuted "them if proceedings in bankruptcy had not been instituted "unless by consent of proposed defendant," and claim that the trustee's power to recover a dividend received by a creditor is limited by this section, and that proceedings to recover the same shall be in accordance therewith. It is manifest, however, that this section has reference merely to claims by the trustee against third persons, strangers to the bankruptcy procedings. This cannot apply to a creditor who has voluntarily submitted himself to the jurisdiction of the court; he is not such a third person as is contemplated by Section 23*b*.

The effect of the rejection of a claim that has once been allowed, the allowance of the claim being, as we have shown, equivalent to a judgment, is analagous to the result of the reversal on appeal of a judgment which has been paid in full. It is the law that on the reversal of a

judgment the party is to be restored to all things which he lost by the judgment below, and if he has paid money on an execution upon the judgment he will be entitled to judgment of restitution for the sum collected from him. This power to compel *restitution* is inherent in all courts and should be exercised in all proper cases.

Andrews v. *Thum,* 71 Fed., 763.
Emes v. *Stevens,* 26 N. H., 117.
Pangburn v. *Ramsay* (N. Y.), 11 Johnson, 143.
Jones v. *Hacker,* 5 Mass., 264.
Boyett v. *Vaughn,* 86 N. C., 725.
Ming v. *Suggett,* 34 Mo., 364.
Scott v. *Conover,* 10 N. J. L., 61.
Crawford v. *Heft,* 58 Mich., 1.

On account of the novelty of the act no reported case in this country upon the point here presented can be found in the books, but in an English case, ERSKINE, C. J., compelled a creditor who had filed a claim against a bankrupt's estate, to refund a part of the dividend received by him upon the ground that the claim filed by the creditor was excessive. The learned Judge used the following language: "As to the "first question, looking at the payments in question as made "to a creditor whose proof remained on the proceedings, and "therefore payments made *in the administration of a trust;* "and considering the other creditors of bailee as interested "in the restoration of the money to the estate; adopting the "principles that guide courts of equity in the administration "of trust estates, and upon which legatees are made to re-"fund for the benefit of creditors, notwithstanding the lapse "of time, or the negligence of the executor; the court is of "opinion that the respondent can not shelter himself under "the statute of limitations, which in such cases is not al-

"lowed to interfere with the due administration of the trust "estate.

"But as the payments made previous to Greenwood's bank- "ruptcy were made by the assignees in ignorance of a fact; "and the amount at the time of his bankruptcy constituted "a legal debt, which the assignees, by expunging Parker's "proof, might have been proved, and may still be proved "under Greenwood's commission; we are of opinion that as "to those sums, amounting to £2521, 7 s 10 d he is entitled "to the protection of his certificate under the positive en- "actment of the bankrupt laws; and that the order for re- "funding must be confined to the three latter sums, amount- "ing to 129£ 6s 11d the proof therefore must be expunged, "and the sum of 129£ 6s 11d must be refunded."

Ex parte Bolton et al., 1 Deacon & Chitty's Rep., 556-562.

It thus appears that the court compelled the creditor to repay part of the dividend received by him upon the ground that the payments were made in *the administration of a trust*, and the court invokes the general equitable powers of a bankruptcy court, but our present bankruptcy act goes further and expressly provides that dividends paid upon a claim which is afterwards rejected shall be repaid.

For the reasons above set forth the judgment appealed from should be affirmed.

Respectfully submitted.

ELI B. FELSENTHAL,
HERMAN FRANK,
Counsel for Appellee.

In the Matter of the Fort Wayne Electric Corporation, Bankrupt, 99 Fed. Rep., 400.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

October Term, A. D. 1899.

In the matter of the Fort Wayne Electric Corporation Bankrupt.

Columbus Electric Company, Appellant,
vs.
Charles S. Worden, Trustee in Bankruptcy of the Fort Wayne Electric Corporation,

Appeal from the District Court of the United States for the District of Indiana.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

The Columbus Electric Company, the appellant, on the 9th of December, 1898, was the creditor of the Fort Wayne Electric Corporation to the amount of $14,646.08 and on that day received the three notes of the debtor, each bearing date upon that day and being for equal portions of the indebtedness and payable, respectively, in thirty, sixty and ninety days from that date. The first note matured January 11, 1899, and on the 20th of January, 1899, that creditor received from its debtor in part payment of the note the sum of $2,500 in money, and this without the knowledge of the

insolvency of the debtor and without reason to believe the debtor to be insolvent and without reason to believe that any preference was thereby intended by the debtor over other creditors. Afterward, creditors of the Fort Wayne Electric Corporation filed their petition in bankruptcy against that corporation, and on the 25th day of January, 1899, the corporation was duly adjudged a bankrupt. On the 24th day of March, 1899, the appellant filed its claim in such bankruptcy proceedings for the balance of the amount due upon the three promissory notes. The referee certified the question of the allowance of the claim to the District Court sitting in Bankruptcy, which court afterward ordered as follows: "1st. "That if the said Columbus Electric Company shall on or "before thirty days from this date surrender to the trustee "for the benefit of the estate of said bankrupt the sum of "$2,500 so paid January 20, 1899, then the full amount "of said claim at the date of filing the petition in bank- "ruptcy herein, to-wit, the sum of $14,884.56, is allowed "as an unsecured claim, and that said sum is ordered to be "entered upon the books of the trustee as the true sum upon "which to compute dividends. 2d. That if such claimant "shall fail or refuse to repay said sum of $2,500 on or be- "fore thirty days from date hereof the said claim is disal- "lowed and expunged from the list of claims upon the "trustee in this cause." This ruling is brought here for review. The opinion of the court below is reported *In re* Fort Wayne Electric Corporation, 96 Fed., 803.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court:

The question presented is this: Can a creditor, who has within four months of his debtor's bankruptcy innocently received a payment upon his debt, be permitted to prove his debt in the bankruptcy proceeding and to receive from the

estate of the bankrupt a dividend thereon without surrendering the preference received? The question is one purely of statutory law and depends for its solution upon the construction to be given to certain sections of the bankruptcy act. (30 Stat., 541.)

Section 60*a* defines a preference as follows: "A person "shall be deemed to have given a preference if, being in- "solvent, he has procured or suffered a judgment to be en- "tered against himself in favor of any person, or made a "transfer of any of his property, and the effect of the en- "forcement of such judgment or transfer will be to enable "any one of his creditors to obtain a greater percentage of "his debt than any other of such creditors of the same class." Section 60*b* provides that the trustee may recover from the recipient any preference received within four months of the bankruptcy if the latter had reason to believe that a preference was intended. Section 3 defines acts of bankruptcy, one of which is: (2) A transfer, while insolvent, to a creditor of any portion of his property with intent to prefer such creditor. Subdivision *b* of that section provides that an involutary petition in bankruptcy may be maintained for such act of bankruptcy committed within four months before the filing of the petition. Subdivision 25 of Section 1, treating of definitions, provides that the word "transfer," as used in the act, shall "include the sale and every other and "different mode of disposing of or parting with property, "or the possession of property, absolutely or conditionally, "as a payment, pledge, mortgage, gift or security." Section 57, subdivision *g*, provides as follows: "The claims of "creditors who have received preferences shall not be al- "lowed unless such creditors shall surrender their prefer- "ences." It is apparent from these provisions of the law that not all preferences by an insolvent debtor may be avoid-

ed. The Congress has seen proper to provide that the trustee in bankruptcy may recover preferences in the event, only, that the creditor had reasonable cause to believe that a preference was intended. It was not designed to interrupt the usual course of business, or to compel a creditor to pay back that which he had innocently received. This, however, does not conclude the case. When a creditor, who has in fact received a preference, comes into the court of bankruptcy seeking to share with other creditors in the estate of the bankrupt, he must come, if at all, upon the terms and the conditions that the law imposes. It is the fundamental principle of the bankrupt law that "equality is equity." The act seeks to marshal the assets of the bankrupt, recovering all property disposed of by the bankrupt in fraud of the act, and to distribute the fund equally among all the creditors in proportion to the amount of their respective claims. This principle we conceive to be distinctly recognized by section 57*g*. That section takes notice of the fact that a creditor who has been innocently preferred can not be compelled to return that which he has received, but it says to him: While the law will not interfere with you with respect to that which you have received and because you received it innocently, yet, if you come to the court asking that you may share with the other creditors in the remaining estate of the bankrupt, you must surrender the preference which you have received, however innocently, for equality is equity, and he who seeks equity must do equity. The act of preference is condemned by the law, but because you were innocent in the taking of it the law will not disturb your possession of that which you received, but when you ask the aid of the court to give you a further share of the estate, you must be content to place yourself upon an equality with other creditors, and that can only be done by a surrender of the preference which you have received.

We think this the clear intent of the law-giver. We do not need to enter upon a critical examination of the various phrases of the act, or to indulge in an investigation of the technical meaning of the words there used. That has been fully gone over in the opinion of the court below whose decision is here under review and in which, in general, we concur.

This view of the proper construction to be given to section 57*g* finds support in the provisions of section 65*d* which declares that a creditor, who has received through a court of bankruptcy in a foreign country a share of his debt and seeks to prove the balance of that debt in bankruptcy in this country, shall not receive any part of his debt here until the creditors resident here shall first have received a dividend equal to the amount received by that creditor through such foreign proceedings. This goes upon the doctrine of equality among creditors. The courts here had not jurisdiction over the property of the bankrupt in the foreign country. What the creditor there received was legally obtained and adjudged to him as of right. The court here could not take it from him, and yet, in the same view in which we regard section 57*g*, the law declares that such creditor shall not, in the distribution of the estate here, have the benefit of that which he legally received elsewhere, but he must stand upon the footing of equality with creditors here, and they shall first be paid out of the estate here an amount equal to that which such creditor received there. The language of section 57*g* is broad and comprehensive and is not susceptible of the restricted construction sought to be placed upon it, unless the word "preference" should receive a narrow and strained construction. It is urged that the term preference means a transfer of property and not a payment of money. In other words, that an insolvent

debtor, seeking in fraud of the act to prefer in part certain of his creditors, can not so do by transfer to them of his property, but he may sell that property and turn it into money and with impunity pay his creditors with that money, and, although they have received it with guilty knowledge of the intent to prefer and of the insolvency of the debtor, the trustee can not recover it back because it was paid in money and not in property. We think this a narrow view of the law and one that would work incalculable mischief. We are not disposed to place such a construction upon the act if it can in reason be avoided, and we are unwilling to put upon the section what we deem to be a strained construction of a broad term, in view of the mischief which would follow. It may not be denied that there are words and phrases in the act, as pointed out in the case of *In re Piper,* 2 N. B. News, 7, elsewhere unreported, which lend support to the opposite contention, but we think that the general harmony of the act would be marred by the narrow construction sought to be placed upon the phrase "preference." The bankrupt here intended to prefer the appellant in the sense that while insolvent it sought to give an advantage over other creditors. It was received, to be sure, innocently and without knowledge of that intent, but the payment none the less worked a preference. It gave to the appellant an undue advantage over other creditors, and while the act will not permit a recovery by the trustee of the payment because it was received innocently, it none the less remains that the meaning of the act is that if the appellant seek further payment out of the estate of the bankrupt he shall share equally with other creditors with respect to his claim. That can only be accomplished by a surrender of the preference received as a condition of further payment out of the bankrupt estate.

This construction, as we think, works out the highest equity between creditors. It may be difficult to reconcile the various phrases used in the act, but the construction which we place upon the section gives to the language therein employed its natural meaning.

The case of *In re Conhaim*, 97 Fed., 923, reaches the same conclusion.

The order is affirmed.

In the Matter of Fixen, Bankrupt. 102 Fed. Rep., 295.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

In the matter of the Bankruptcy of Fixen & Company.

Edward W. Forgy, Trustee of the Estate of Fixen & Company, Appellant,

vs.

Marshall Field & Company, Appellee.

Appeal from the District Court of the United States for the Southern District of California.

This cause comes before this court upon the alleged error of the District Court for the Southern District of California, sitting as a Court of Bankruptcy, in allowing the claim of Marshall Field & Co. against the estate of Fixen & Co., bankrupt.

It appears that on May 29, 1899, Fixen & Co. were indebted to Marshall Field & Co., appellees herein, in the sum of $745.61, for merchandise sold and delivered to said Fixen & Co. by the appellees, and that on that day the appellees received from Fixen & Co., in the ordinary course of business, the sum of $428.45, on account of said indebtedness, leaving a balance of $317.16 still due the appellees. Shortly thereafter the appellees again sold merchandise to the said Fixen & Co. to the amount of $232.50, making a total indebtedness of $549.66. It has been shown that Fixen & Co.

were insolvents on May 29, 1899, when they made the payment on account to the appellees, and that said payment was made within four months of the filing of the petition in bankruptcy. The court below allowed the claim of appellees, as creditors of the bankrupt, for $549.66. The Trustee of the bankrupt estate, appellant herein, objected to the allowance upon the ground that the bankrupt had, while insolvent, given a preference to the claimant Marshall Field & Co.; by said payment on account; that said claimant had not surrendered any portion of said payment to the bankrupt estate or to the trustee thereof, and the enforcement of said transfer and payment would give to said claimant a greater percentage of its debts than to other creditors of the same class. Upon this contention the Trustee brings the matter to this court, and asks for a reversal of the judgment of the court below.

E. T. Dunning, solicitor for appellant.

Charles Udell, L. L. Shelton and H. G. W. Dinkelspiel, solicitors for appellee.

Before GILBERT, ROSS and MORROW, Circuit Judges.

MORROW, Circuit Judge, delivered the opinion of the court.

The question to be determined in this case is, whether a payment made on account by an insolvent debtor, in the ordinary course of business within four months prior to his adjudication in bankruptcy, where it does not appear that the creditor receiving the payment had reasonable cause to believe that it was intended as a preference, constitutes a preference under the bankrupt act that will prevent the allowance of the creditors' claims for the balance of the account. Section 60 of that act provides (30 Stat., 544):

"*(a)* A person shall be deemed to have given a prefer-

" ence if, being insolvent, he has procured or suffered a judg-
" ment to be entered against himself in favor of any person,
" or made a transfer of any of his property, and the effect
" of the enforcement of such judgment or transfer will be
" to enable any one of the creditors to obtain a greater per-
" centage of his debt than any other of such creditors of the
" same class."

It has been questioned whether a payment of money in the ordinary course of business can be construed a transfer of property. In Section 1 of the same Act, however, the word " transfer " is defined as including " the sale and every other " and different mode of disposing of or parting with property, " or the possession of property, absolutely or conditionally, " as a payment, pledge, mortgage, gift or security." As the word " property " is legally understood to include every class of acquisitions which a man can own or have an interest in, it must certainly cover money, and the payment of money, therefore, by an insolvent to an unsecured creditor within the statutory period, must be considered a transfer of his property, constituting a preference under Section 60*a* of the Act of Bankruptcy, the enforcement of which transfer would allow one creditor to obtain a greater percentage of his debt than any other creditors of the same class.

How is such preference to be dealt with? Subdivision *b* of Section 60 of the same Act provides:

" If a bankrupt shall have given a preference within four
" months before the filing of a petition, or after the filing
" of the petition and before the adjudication, and the person
" receiving it or to be benefited thereby, or his agent acting
" therein, shall have had reasonable cause to believe that it
" was intended thereby to give a preference, it shall be void-
" able by the trustee, and he may recover the property, or its
" value from such person."

It is not contended that the appellees herein believed or had any knowledge that the payment from the bankrupt was intended to give them a preference, or that it would in effect be a preferential transfer. The Trustee could not, therefore, recover upon the ground stated in Subdivision *b*. But the Bankruptcy Act provides, in 57*g* that "the claims of creditors "who have received preferences shall not be allowed un- "less such creditors shall surrender their preferences." The appellees have not surrendered their preferences, yet seek to have their claim allowed for the balance due them from the bankrupt, upon the contention that they received the payment from the bankrupt in good faith, without the knowledge of his insolvency, continued to sell goods to the bankrupt firm in the usual course of business, and that the acceptance of said payment on account should not be held as a preference which would prevent the allowance of their claim.

In the former Bankruptcy Act of 1867 the belief of the creditor as to the intention of the debtor in giving a preference was considered, when the surrender of such preference was required. In Section 23 it was provided:

"Any person who * * * shall have accepted any "preference, having reasonable cause to believe that the "same was made or given by the debtor contrary to any pro- "vision of this act, shall not prove the debt or claim * * * "until he shall have first surrendered to the assignee all prop- "erty, money, benefit or advantage received by him under "such preference."

But in the Act of 1898 Congress omitted from Section 57*g* any reference to cause for belief on the part of the creditor, and stated in concise and unmistakable terms that "the "claims of creditors who have received preference shall not

" be allowed unless such creditors shall surrender their pref-
" erences." It is evident that the purpose or intent of the parties in giving or receiving a preference was not intended to be considered in this section, but the effect of the preference in the benefit or advantage which it would give to one creditor over another. No penalty is imposed on the creditor by the section, but merely an option on the part of a creditor who has received a preference to keep what he has received and take no dividends from the bankrupt estate, or to surrender his preference and share equally with the other creditors in the distribution of the estate. The fundamental principle of the act is the real and effectual equality in the distribution of the bankrupt estate. Lowell, Treatise on the Law of Bankruptcy, p. 43. In the disposition of property among creditors equality is equity. *Bank* v. *Sherman*, 101 U. S., 403, 406. To accomplish the purpose of the statute the court exercises its equitable jurisdiction in dealing with preferences. The right to prefer creditors is an infirmity still remaining in the body of the common law. It is contrary to the letter and spirit of the maxim that equality is equity. *Butler Paper Co.* v. *Robbins*, 151 Ill., 632; 11 Am. & Eng. Enc. of Law, 2d ed., 186. In this view of the scope and purpose of the act, it certainly can not be considered inequitable to require one who has received an undue portion of the estate, no matter if innocently, to surrender that advantage before participating in further distributions of the estate with those who have not received such preferences. *Collier* v. *Bank*, p. 286.

It is urged very earnestly on behalf of the appellee, and by counsel who have appeared as *amici curiae*, that this interpretation of the act will be disastrous to credit, that it will unsettle business, and render mercantile transactions so uncertain and insecure that the country at large will suffer

by it. It is further contended that Congress did not intend by this act to interfere with or disturb the ordinary course of business of the country, and in support of a construction of the statute that will avoid such supposed consequences, numerous authorities are cited, which may be summed up in the rule that "statutes will be construed in the most bene- "ficial way which their language will permit to prevent "absurdity, hardship or injustice." Sutherland on Statutory Construction, Sec. 324. The first observation pertinent to the consideration of this rule is that the province of construction lies wholly within the domain of ambiguity. *Hamilton* v. *Rathbone*, 175 U. S., 414, 421. It must therefore appear that the statute is ambiguous, and thus open to construction. "The considerations of evil and hardship "may properly exert an influence in giving a construction to "a statute when its language is ambiguous or uncertain and "doubtful, but not when it is plain and explicit. The same "may be said of the consideration of convenience, and, in "fact, of any consequences. If the intention is expressed "so plainly as to exclude all controversy, and is one not "controlled or affected by any provision of the Constitution, "it is the law, and courts have no concern with the effects "and consequences; their simple duty is to execute it." Sutherland on Statutory Construction, Sec. 324.

That the bankrupt act is ambiguous and uncertain in many of its provisions cannot be denied. But, we are of the opinion that the particular provisions under consideration are reasonably clear and certain. Section 57*g* provides that the claims of creditors who have received "preference" shall not be allowed unless such creditors shall surrender their "preference." There is no ambiguity in this provision, and no uncertainty as to its purpose. When a creditor presents a *bona fide* claim against the bankrupt estate,

the question to be determined is, has the creditor received a "preference" in his dealings with the bankrupt? If he has, the claim cannot be allowed. If he has not, it must be allowed. Then the question arises, what is the meaning of the word "preference?" If we turn to Section 60*a* we find the word "preference" defined, and it is there declared to mean "a transfer" by the bankrupt "of any of "his property" where the effect of the enforcement of such a "transfer" will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. This definition fits very closely into Section 57*g*, and points out still more distinctly the preferred claims that are disallowed. But to understand accurately the character of the transaction that will amount to a preference, we must look for the meaning of the words "transfer of property." This meaning is found in paragraph 25 of Section 1 of the act, where a "payment" is explicitly made one of the methods of transferring property. With respect to the question under consideration, the statute itself has furnished us with this information: (1) That a payment of money is a transfer of property; (2) a transfer of property by an insolvent debtor, whereby his creditor obtains a greater percentage of his debt than any other creditor of his class, is a preference; (3) a claim of a creditor who has received a preference shall not be allowed, unless such creditor shall surrender his preference. The word "preference," as used in Section 3*a*, paragraph 2, and Section 60*b*, has no other meaning than that declared in Section 60*a*. It is true that in those other sections a preference qualified by certain other conditions produces other consequences, but the consequences clearly follow from the other conditions, and not from any different meaning attached to the word "preference."

It is to be further observed that the construction which the appellees give to Section 57*g* is the same as was given to Section 23 of the Act of March 2, 1867. (14 Stat., 517, 528.) But in that section it was provided that the creditor should not prove his claim if he had accepted a preference "having reasonable cause to believe that the same was made "or given by the debtor" contrary to the provisions of that act, until he had surrendered the preference. This construction would require that the creditor's claim should be allowed under the present act, unless it should be established that the creditor had reasonable cause to believe that the preference was made or given by the debtor contrary to the provisions of the act. To give the act this construction, we must do that which Congress has failed to do, namely, interpolate the qualifying provision of the former act. This we can not do. As was said by the Supreme Court in *Bank* v. *Sherman, supra,* "we can not interpolate what is claimed. "Such a function is beyond the sphere of our power and "duty. It is our business to execute the law as we find it, "and not to make or modify it." But, assuming that this preference to different provisions of the present act and the comparison made with the corresponding provisions of the former act to ascertain the meaning of the statute demonstrates that it is open to construction. What follows? As we have read the act, is its meaning absurd? No such claim is made, and could not be sustained if urged. Does this meaning or interpretation of the act work hardship or injustice? It is claimed that it does, and that by interfering with the ordinary transactions incident to trade upon credit the administration of the law as thus interpreted will destroy the business of the country. This is by no means clear. The creditor is not compelled to surrender a payment made to him on account in the ordinary course of business unless

he has reason to believe that his debtor is insolvent, and that the payment is a preference. If the creditor is innocent in the transaction, he has his option to retain the payment and waive his claim to the balance of the account, or he may surrender the payment and present his claim for the whole account. He will do that which will be to his best interest, and his loss, in any event, will be one of degree. It is a well-known fact that the credit system of trade has its limitations and restrictions adjusted as far as possible to the contingencies of loss by insolvency, and that the possibility of insolvency and its attending loss is a continual factor in the ordinary business of the country which the bankrupt act is expected to adjust and equalize among all creditors of an equitable and just distribution and settlement of the insolvent estate. It would seem, therefore, that instead of destroying business, the interpretation we give to the act will be to the advantage of legitimate credit in placing all creditors as nearly as possible on an equal footing. This view of the statute has been taken in the following cases, in which the question now under consideration has been fully and ably considered:

In re Knost, 1 N. B. N., 403; *in re Cohaim,* 2 N. B. N., 148; *in re Wise,* 2 N. B. N., 151.

In the case of *Columbus Electric Co.* v. *Worden,* 3 A. B. R., 634; 99 Federal, 400, the Circuit Court of Appeals for the Seventh Circuit reaches the same conclusion.

The Fort Wayne Electric Company, being indebted to the Columbus Electric Company, gave three notes covering the indebtedness, maturing upon various dates. After the maturity of the first note the creditor received from the debtor a partial payment thereon, in the regular course of business, and without reasonable cause to believe that the debtor was insolvent, and without an intent to obtain an unlawful pref-

erence. Shortly afterwards involuntary proceedings were instituted against the debtor by other creditors, and it was adjudged bankrupt. The Columbus Electric Company filed its claim for the balance due upon the notes. The District Court ordered that if the said creditor should surrender to the trustee the sum received from the debtor as a partial payment, then the full amount of its claim would be allowed as an unsecured claim; but upon the refusal of the creditor to repay said amount, its claim should be disallowed and expunged from the list of claims upon the trustee. The case was appealed to the United States Circuit Court of Appeals. In expressing the opinion of the court, after discussing the sections of the act herein construed, Judge JENKINS said:

"The bankrupt here intended to prefer the appellant in "the sense that while insolvent it sought to give an advan- "tage over other creditors. It was received, to be sure, in- "nocently and without knowledge of that intent, but the "payment none the less worked a preference. It gave to "the appellant an undue advantage over other creditors, and, "while the act will not permit a recovery by the trustee of "the payment because it was received innocently, it none "the less remains that the meaning of the act is, that if the "appellant seek further payment out of the estate of the "bankrupt, he shall share equally with other creditors with "respect to his claim. That can only be accomplished by "a surrender of the preference received as a condition of "further payment out of the bankrupt estate.

"This construction, as we think, works out the highest "equity between creditors. It may be difficult to reconcile "the various phrases used in the act, but the construction "which we place upon the section gives to the language "therein employed its natural meaning."

This opinion expresses our views upon this subject.

The judgment of the District Court is reversed, and the cause remanded to said court, with directions to disallow the entire claim of Marshall Field & Co., and expunge it from the list of claims against the bankrupt estate.

In the Matter of Conhaim. 97 Fed. Rep., 923.

IN RE CONHAIM. DISTRICT COURT, D. WASHINGTON, N. D.

November 28, 1899.

1. *Bankruptcy—Preferences—Payment of Money.*

Payment of a debt in money is a transfer of property, within the purview of Bankruptcy Act, Section 60*a*, providing that a debtor shall be deemed to have given a preference if, being solvent, he has made a transfer of any property, and the effect of the enforcement of such transfer will be to enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.

2. *Same—Proof by Preferred Creditor—Knowledge of Creditor.*

Under Bankruptcy Act, 1898, Section 57*g*, providing that "the claims of creditors who have received preferences shall "not be allowed unless such creditors shall surrender their "preferences," it is immaterial that the creditor did not know, or have cause to believe, that the debtor was insolvent or that he was receiving a preference, if such was actually the fact. This provision is not limited or modified by the distinct provision of Section 60*b*, that preferences shall be voidable by the trustee if the creditor "had reasonable cause "to believe that it was intended to give a preference."

3. *Same—Surrender of Preference.*

Where a creditor, holding four promissory notes of his insolvent debtor, received several payments on account, all within four months before the debtor was adjudged bank-

rupt, and so applied the payments as to extinguish two of the notes, partly satisfy the third, and leave the fourth wholly unpaid, held, that he could not prove the fourth note in the character of an unpreferred creditor, but must surrender all the payments received, as a condition upon being allowed to prove any claim against the estate.

In Bankruptcy. On question certified by referee in bankruptcy.

Brady & Gay, for trustee in bankruptcy.

Piles, Donworth & Howe, for proving creditor.

Hanford, District Judge. This is a case of voluntary bankruptcy, in which the referee has certified to the court for decision a question as to the right of the Washington National Bank to prove against the bankrupt estate, and have allowed debts due to the bank upon two promissory notes, one of which has been partially paid. The trustee contends that the claim of the bank as to both of said promissory notes should be rejected, unless the bank will surrender the amounts of the several payments made by the bankrupt on account of his indebtedness to said bank. The facts of the case are as follows: On January 1, 1899, the bank held four promissory notes given by the bankrupt for loans made to him by the bank. Between January 1 and February 20, 1899, the bankrupt made several payments to the bank on account of his indebtedness on said notes, amounting in the aggregate to $3,150; the last payment being on the 14th day of February. The petition to be adjudged a bankrupt was filed in this court on the 20th day of February, 1899. The payments when made were not applied on all of the four promissory notes, but were so applied as to extinguish two of them, and the surplus was all applied on one of the notes now held by the bank, leaving a small balance unpaid; and

the fourth note, amounting to $1,500, with accrued interest, remains wholly unpaid. At the time the payments were made the bankrupt was in fact insolvent, but there is no evidence tending to prove that the officers of the bank had any reason to suppose that he was in that condition, or that they were receiving a preference over other creditors.

Section 57*g* of the Bankruptcy Act provides that "the "claims of creditors who have received preferences shall not "be allowed, unless such creditors shall surrender their pref- "erences." The attempt is made to avoid the objection to allowance of this claim by insisting that the bank has not received a preference, and in the argument there is an attempt to draw a distinction between preferences given and preferences received; that is to say, when an insolvent debtor disposes of his property so as to benefit one creditor, and knows that his other creditors must suffer a loss, the benefit so given is, as to the debtor, a preference, but, if the creditor who receives it does not happen to know that he is gaining an advantage over other creditors of the same debtor, then, as to him, there is no preference. This appears to me to be, in truth, a hair-splitting argument. It seems to me that, when a preference is given, there is necessarily a preference received. The word "preference," as used in the Bankruptcy Act, must be given its usual and ordinary definition; and it means exactly the same thing, whether connected with the word "given," or with the word "received." This section of the act was not intended to impose a penalty, but merely to give creditors who received preferences options to keep what they have received, and take no dividends from the estate, or to surrender their preferences, and share equally with other creditors in the general distribution. It is the benefit or advantage which one creditor obtains over others, and not the purpose or intent of the parties, which

determines the effect. Section 60*b* provides that in cases of preferences received within four months before filing of a petition, or after the filing, with reasonable cause to believe that it was intended thereby to give a preference, such payment or transfer of property shall be voidable by the trustee, and he may recover the property or its value. This is a distinct provision of the law, and, in my opinion, it does not control the interpretation of Section 57*g*. The law which does govern is found in Section 60*a*, which provides that a preference shall be deemed to have been given when an insolvent person shall have made a transfer of his property, and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class. Referring to the first section of the act, we find that a defintion is given to the word "transfer," giving it a comprehensive meaning, including a payment. So it is made clear by the express terms of the statute that in making payments to the Washington National Bank after the petitioner had become insolvent, and leaving other creditors unpaid, the case was brought within the purview of Section 57*g*; and the bank is therefore required to elect whether to account to the trustee for the $3,150 received in payment, and stand upon a plane of equality with other unsecured creditors, or to retain said amount in lieu of any dividends which it would otherwise be entitled to receive from the estate.

The argument that the bank may assume the position of an unpreferred creditor as to the $1,500 promissory note, and retain the payments which were applied on the other notes, is, in my opinion, contrary to the spirit and letter of the statute. The prohibition contained in Section 57*g* is not limited by the terms of the section to the particular debt or chose in action on account of which a preference has been

received, but it refers to creditors who have received preferences, and provides that the claim of such creditors shall not be allowed, unless they shall surrender the preferences received. In the very excellent treatise by Mr. Frank O. Loveland, the following commentary is made upon this section of the statute:

"The language of this provision is much broader than "that contained in the former bankrupt acts. Under the "Act of 1867 such creditors were prohibited from proving "only 'the debt or claim on account of which the preference' "was made. Under that provision the court held that where "a creditor had two disconnected debts, and had received a "fraudulent preference as to one only, he might prove the "other, and receive dividends upon it. It may be doubted, "however, under the present statute, if a creditor who has "received a preference can prove any claim until he has sur-"rendered his preference." Loveland, Bankr., p. 257.

Let an order be entered disallowing the entire claim of the Washington National Bank as to both of the promissory notes mentioned, unless said bank shall elect to surrender to the trustee the entire amount of payments which it has received, and present a new claim for the amount which the bankrupt owed on the 1st day of January, 1899.

In the Matter of Wise, Bankrupt, 2 National Bankruptcy News & Report, 157.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK.

In the matter of James T. Wise, Bankrupt.
In Bankruptcy, No. 1437.

Before ROSWELL R. MOSS, Esq., Referee.

Objections by the trustee and by certain creditors to the allowance of claims of certain other creditors, alleged to have received preferences not surrendered.

A. C. Eustace for the bankrupt and certain creditors.

Robert T. Turner, Herendeen & Mandeville, Frederick Collin, Charles M. Marvin, Boyd McDowell, J. John Hassett, F. A. Williams, respectively, for certain creditors.

OPINION.

At the first hearing of the first meeting of creditors in this matter, many claims of creditors which had been filed with the referee, or which were then presented, were acted upon and allowed. And at different hearings since then, pursuant to adjournments of the first meeting of creditors, other claims have been presented and allowed. At the first hearing one of the claims was presented by the Second National Bank of Elmira, upon a note for $3,400. It appeared that at one time the indebtedness of the bankrupt to the bank was represented by a $4,000 note, upon which a payment of $600 was made within four months prior to the filing of his petition; and the note upon which the claim presented was founded, given for the balance remaining after

such payment. Objection was made at that time, under section 57*g* of the Bankrupt Act, to the allowance of that claim, upon the ground that such payment was, as claimed, a preference. At the different hearings during the first meeting of creditors, it appeared with respect to other claims that payments had been made to the creditors presenting them during the four months prior to the filing of the petition. And different creditors represented by their attorneys have made similar objection to the allowance of those claims. At the first meeting such claims as were objected to were allowed for the purpose of participation in choice of trustee; and the decision of the questions raised by the objections to those claims, as well as by similar objections to claims subsequently presented, has been reserved; the claims having been allowed conditionally and subject to such reservation.

The provision of the Bankrupt Act of 1898 to be especially considered in the determination of the question are those contained in Section 1, defining the term transfer; 3, declaring what transfers are acts of bankruptcy; 60*a*, providing when a person shall be deemed to have given a preference; *b*, when a preference shall be voidable, and the trustee may recover it; and section 57*g*, providing that "the claims of creditors "who have received preferences shall not be allowed unless "such creditors shall surrender their preferences."

In construing and applying these provisions of the present law, provisions of former acts and the judicial interpretation of them may and should be considered. For it is within a rule of statutory construction that a prior act, since repealed, may be considered in arriving at the legislative intent in the subsequent enactment of a statute upon the same subject. Not only is the legislature, where it uses the language of the former statute, may be deemed to have used that lan-

guage according to the judicial construction it underwent, but, if in the enactment of the subsequent statute it is found that provisions have been added to those in the former, or that some of the provisions of the former, particularly if they have been conditional provisions, have been omitted, such conditions and omissions must be taken as significant of the legislative intent in the subsequent enactment. This seems to be elementary, and it is clearly within the reason of the rule of Sedgwick in his treatise on Statutory Construction, at pages 250, 251, quoting Lord Mansfield and Justice Parke.

Referring, first, to the act of 1867, under section 18 no person who had received any preference contrary to the provisions of that act could vote for or be eligible as assignee.

Section 35 provided that a payment or transfer made by a person being insolvent or in contemplation of insolvency within four months before the filing of the petition with a view to giving a preference to any creditor or person having a claim against him, such creditor having reasonable cause to believe him insolvent; or such payment, transfer or conveyance made within six months before the filing of the petition to any person with a view to prevent his property going to his assignee, such transferee then having reasonable cause to believe him insolvent or acting in contemplation of insolvency, the transaction should be void and the assignee might recover the property or the value thereof as assets of the bankrupt.

Section 39, defining acts of bankruptcy upon which involuntary proceedings could be predicated, named, among such acts, the making, while insolvent, or in contemplation of insolvency, any payment, sale, conveyance or transfer with intent to give a preference to one or more of his creditors,

and that if such person should be adjudged a bankrupt the assignee might recover back the money or other property so paid or transferred contrary to that act, providing the person receiving it had reasonable cause to believe the debtor was insolvent, and that such creditor should not be allowed to prove his debt in bankruptcy. Section 19 provided what classes of debts were provable; and, under section 20, a debt secured by a mortgage or pledge of real or personal property could be proved for the balance after deducting the value of such property, or the security could be released and the whole debt proved; the section containing a provision for determining the value of the security by sale, and providing, further, that if the property was not so sold or released and delivered up, the creditors should not be allowed to prove any part of his debt. And under section 23 it was provided that any person who should have accepted any preference having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of that act, should not prove the debt or claim on account of which the preference was made or given, nor should he receive any dividend therefor until he should first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference.

Turning, now, to the act of 1898, section 1 (25) defines transfer, as used by the act, to include the sale and every other and different mode of disposing or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security. Among the acts of bankruptcy which may be the foundation for involuntary proceedings, defined by section 3, are transfers by an insolvent of any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. Section 60*a* declares that a person

shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any of such creditors of the same class. Section 60*b* provides that if a bankrupt shall have given a preference within four months before the filing of a petition, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by that trustee and he may recover the property or its value from such person.

Section 57, making provision for proof of claim by statements in writing under oath and for their allowance after being so proved, and that claims of secured creditors may be allowed to enable them to participate in the proceedings of meetings held prior to the determination of the value of their securities, but especially allowed for such sums only as seem to be owing over and above the value of the securities, and permitting the hearing and determination of objections to claims as soon as the convenience of the court permits, declares in clause *g*, that "The claims of creditors "whom have received preferences shall not be allowed un- "less such creditors shall surrender their preferences."

Many words and terms used in the Act of 1867 needed and underwent judicial interpretation and definition. The Act of 1898 in the first section, gives statutory definitions to many such words used in it. And insolvency as used in the Act of 1898 has a very different definition to that which the court gave it as used in the Act of 1867. The term preference is not defined in section 1, but I think the provisions of section 60*a* are a definition of that term wherever used in the act. So that, if the effect of a transfer, which

by Section 1 includes a payment, made by an insolvent, who, as defined by the act, is one whose property at a fair valuation is less than his debts, is to enable one creditor to obtain a greater percentage of his debt than others, the transfer is a preference without regard to the intent with which it was made or received. To be an act of bankruptcy under Section 3, it must have been made with intent to prefer such creditor over other creditors. And under Section 60*b*, to enable the trustee to avoid it and recover it back, the person receiving it or to be benefited thereby or his agent acting therein, must have had reasonable cause to believe that it was intended as a preference. But I do not find anything in the plain language of Section 57*g* limiting its prohibition of the allowance of claims of creditors who have received preferences, unless such preferences be surrendered, to preferences which have been received with knowledge or reason to believe the preference was intended. And the fact that the Act of 1867 in Section 23 contained such provision makes its omission in Section 57*g* of the present act, significant of the legislative intent to make its provisions applicable to all preferences as they are defined by Section 60*a*. The foregoing comparison of the language of the two acts, leads to the conclusion that any payment made by an insolvent working a preference, needs to be surrendered by the creditor before a claim proved by him can be allowed. This conclusion is all the more irresistible because contrary to my impression formed when the objections to the allowance of the claims of creditors who had received payments were interposed in this case. And this conclusion finds support in the opinion of Referee Waite in the matter of Knost & Wilhemy (1 Nat. Bankruptcy News, 403). I would be disposed to follow such a prior decision by another referee in the absence of a controlling

decision to the contrary by a higher court, and would not attempt to overrule it unless I could give more satisfactory reasons. But the opinion of Referee Waite in that case is so thorough and his reasoning so logical and forceful, as to convince me of the correctness of its result so far as it defines Section 57*g* of the present act. And the same decision is reported to have been made by the referee at Dallas, Texas, in the matter of *Scott*, 1 National Bankruptcy News, 226.

A more extended reference to and consideration of the decisions under the Act of 1867 than is presented by the opinion in the matter of *Knost & Wilhemy*, leads to the same result. The multitude of cases under that act which consider the question of the effect upon the proof and allowance of claims of preferences and securities is too great to refer to them all, or to attempt even a generalization of their holdings. Reconciliation of their differences is not necessary here. In brief, it may be said that, as the provisions of that act were being construed by the courts, it came to be held that the first clause of Section 35, and its four months limitation of time referred to transfers to creditors, while the second clause and its six months limitation referred to transfers to other parties; that the provisions in Section 39 as to transfers were with reference to involuntary proceedings, and that the general provision at the close of that section giving to an assignee the right to recover a preference made to a creditor, was within the four months limitation of Section 35; and that the provisions of Section 23, prohibiting allowance of claims except upon surrender of preferences, was within the four months limitation of either Section 35 or 39. (*Re Butler, Ex parte Mendel*, 1 Lowell, 506; 4 B. R., 302; Fed. Cas., 9418; *Collins* v. *Gray*, 8 Blatchf., 483; 4 B. R., 631; Fed. Cas., 3013; *Bean*. v.

Brookmire, 4 B. R., 196; Fed. Cas., 1163; *re Richter,* 4 B. R., 221; Fed. Cas., 11803; *re Davidson,* 3 B. R., 418; Fed. Cas., 3599; *re Kipp,* 4 B. R., 593; Fed. Cas., 7376; *Haskell* v. *Ingalls,* 5 B. R., 205; Fed. Cas., 6193; *Sawyer* v. *Turpin,* 2 Lowell, 29; 5 B. R., 339; Fed. Cas., 12410; *re Forsyth,* 7 B. R., 174; Fed. Cas., 4948; *Bingham* v. *Richmond,* 6 B. R., 127; Fed. Cas., 1415; *Tiffany* v. *Lucas,* 15 Wall., 410; *Hall* v. *Wager,* 5 B. R., 181; Fed. Cas., 5951; *Wager* v. *Hall,* 16 Wall., 584. *Hubbard* v. *Allaire Works,* 7 Blatchf., 284; 4 B. R., 623; Fed. Cas., 6814).

Many other cases might be cited to the same effect. A few of which are referred to below on another question.

Referee Waite, in his opinion in the matter of *Knost & Wilhemy,* did not refer to Section 18 of the Act of 1867; and I have not overlooked its apparent similarity to Section 57*g* of the present act. Under that section a preference which worked inelegibility in voting for or being an assignee was dependent upon its being contrary to the act and not limited in terms to its being received with knowledge of its intent. But to have been contrary to the provisions of that act it would seem that a preference must have been given in view of insolvency or contemplated bankruptcy. While, it has been seen, a transfer under the present act may be a preference, though not intended as such. And I find no decisions under Section 18 of the Act of 1867 which considered its omission of any provision as to the knowledge with which the preference was received. But I find one case in which it was held that creditors who had received composition under involuntary proceedings were not entitled after a subsequent adjudication upon petition of creditors not included in the composition, to vote for the assignee, although the court held that the payments in composition were not such

as could be disturbed or recovered back. (*Ex parte Hamline, in re Brodt,* 16 B. R., 320; Fed. Cas., 5993.)

Collier, in his excellent work on bankruptcy, anticipating decisions under Section 57*g*, expressing the view that it includes preferences which could not be alleged as acts of bankruptcy, and although they could not be invalidated, suggests that they are not subject to the limitations of four months found in other sections, although the court might hold that on grounds of public policy preferences received more than four months prior to the filing of a petition need not be surrendered. (Collier on Bankruptcy, 285-286.) I do not think that the doctrine of public policy need be resorted to to find that limitation, although it would have much force if necessary. The provision of Section 39 of the Act of 1867, prohibiting the proof of claims by creditors who had not surrendered preferences, although general and without expressed limitation, was held to be subject to the four months limitation of Section 35. On this subject it was held by the Circuit Court in this district, Judge Woodruff writing the opinion, that although a petition could be filed within six months after the giving of a preference which constituted an act of bankruptcy under Section 39, the preference could not be recovered back unless it was within the four months limitation of Section 35, although the right of recovery, given by Section 39 was general and contained no time limitation. And he said that the concluding sentence of Section 39 would be found to be general and without a time limitation, was to be read and understood with reference to the previous provisions of the act and to be construed in the particular question in that case just as if it would if the words "Subject to the limitations "and provisions of the 35th section" had been added thereto or inserted therein. (*Collins* v. *Gray, supra.*) In

Mayer v. *Helman* (91 U. S., 501) the Supreme Court limited the purpose and scope of the Act of 1867 to the periods limited by some of its provisions, Mr. Justice FIELDS saying: "The great object of the Bankruptcy "Act, so far as creditors are concerned, is to secure equality "of distribution among them of the property of the bank- "rupt. For that purpose it sets aside all transactions had "within a prescribed period. * * * It reaches to pro- "ceedings of every form and kind undertaking or exacted "within that period. * * * That period is four "months for some transactions and six months for others. "These periods constitute the limitation within which the "transactions will be examined and annulled conflicting "with the provisions of the Bankrupt Act. * * * There "is sound policy in prescribing a limitation of this kind. * * * " In all the provisions of the present act in which a period of limitation, prior to the filing of the petition is expressed, that period is four months, and I think the general policy of the act to be ascertained from all its provisions is that that is the limitation of time to which proceedings in bankruptcy strictly so called, and with reference to transactions examined in them extend back prior to the filing of the petition. The period of four months fixed by the act is a statutory limitation of such legal and statutory remedies under it, as an adjudication of involuntary bankruptcy; the condemnation of conveyances as fraudulent within its declarations; for determining what preferences received with knowledge may be recovered from a creditor by a trustee. And while the provision of Section 67*g* prohibiting allowance of claims without surrender of preferences is silent as to the time within which such preferences must have been received, that provision being with respect to the distribution of a fund in equity, a remedy

to be administered according to equity by a court, which the act has clothed with jurisdiction in equity, it is only following precedents set by all equity tribunals to adopt as a limitation of that remedy the statutory or legal rule of four months expressed in the other provisions of the act. It is an old rule and practice in equity which adopts statutory periods of limitations in refusal of remedies for lapse of time. In the reign of Charles II twenty years was considered to be a fit time within which a mortgage was to be redeemable. In imitation of the statute of limitations in real actions so early were the statutes of limitations admitted to be the rule of decision in equity, as well as at law; and though the courts of equity were not within the words of the statutes, the time presented by them was adopted by analogy as a fit and just period for a bar in equity of analogous claims. (Per Chancellor Kent, *Kane* v. *Bloodgood*, 7 Johns, Ch., 90, 113; Pomeroy's Eq. Jur., Sec., 419.)

It is not all payments made by a debtor, subsequently adjudged a bankrupt within the four months' period, which are to be held preferences. To be that, under Section 60*a*, they must have been made while he was insolvent. In this case, upon the facts which have appeared in the examination of the bankrupt and other proof before me, I must find as a fact that the bankrupt was insolvent during all the four months prior to the filing of this petition. Such a finding is consistent with his ignorance of the fact and of his honest belief to the contrary. Nor is it every payment by an insolvent which is a preference under the act. Unless the debtor be adjudged a bankrupt they do not come under the purview of the act, nor under the scrutiny of proceedings in bankruptcy.

I conclude then, that payments made by this bankrupt to his creditors within four months before filing his petition

are preferences, needing to be surrendered before their claims can be allowed. In the case of *Hall* v. *Wager, supra,* it was held that the purpose of the Act of 1867 being to enforce the equal distribution of the estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption permissible by the well settled rules of law to secure the full benefit of that cardinal principle. In the opinion it was said, "The preferences declared void by the "second section of the Act of 1841 were such as were made "by a party contemplating becoming a bankrupt under the "act. There the intent of the debtor was the principal "question. Under the present act a preference created by "a party 'being insolvent' is made void and his intent or "belief is not a question. The fact of insolvency being es- "tablished or admitted the preference ordinarily as to the "debtor is presumed to be void—the presumption being "strong or slight according to the circumstances of each case. "But I can not see that the fact that the debtor knew or "did not know of his insolvency at the time of creating the "preference has much to do in determining the questions as "to him. The purpose of the act being to enforce the equal "distribution of an insolvent's estate, every act of an in- "solvent that tends to defeat that purpose should be con- "strued strictly as against him, and courts should indulge "every presumption that is permissible according to well "settled rules of law to secure the full benefit of this cardinal "principle of law. I would not go so far as to prevent the "exercise of a reasonable *bona fide* effort on the part of an "energetic and hopeful debtor struggling with an honest in- "tent to pay all his debts. For it is often the case that a "trader may be embarrassed and unable to pay his debts "as they mature, but by the exercise of judgment and unre-

" served frankness with his creditors, goes through, pays all, " and converts what was almost a calamity into a profitable " enterprise. But to allow every embarrassed creditor to " thus go on and sustain his acts because he thought he could " go through, and hold as valid all payments and securities, " would be to defeat altogether the object and provisions of " the Bankrupt Act." The Supreme Court affirmed this case on appeal, Mr. Justice CLIFFORD, in delivering the opinion, saying that three things must be proved in order to bring the transaction within the prohibition of the Act of 1867. 1. That the preference was made within four months before filing the petition. 2. That the person giving the preference was insolvent or in contemplation of insolvency at the time the preference was made. 3. That the person benefitted had reasonable cause to believe that the one making the preference was insolvent when the preference was secured and that it was made in fraud of the Bankrupt Act. We have seen that under the present act, knowledge on the part of the creditor is not necessary to bring the preference within the provisions of Section 57*g*. In *Tiffany* v. *Lucas, supra,* it was said that it was for the interest of the community that every one should continue his business, and avoid, if possible, going into bankruptcy. And that that result could not be obtained if the privilege were denied a person who was unable to command ready money to meet his debts as they fell due, to make sales of his property which, if he should fail, notwithstanding all his efforts in keeping out of bankruptcy, such sales being made within six months of that event, would be subject to examination. In the matter of Scott, *supra*, it was said, " The main purpose of the " Bankrupt Act is to take the bankrupt's property into the " custody of the law, and distribute it equally in just pro- " portions among all his creditors. Preferences are the con-

"spicuous frauds in the sense of a bankrupt system, which "the law aims to suppress; and just so far as it fails in this, "it fails to justify its existence, while, on the contrary, so "far as it accomplishes this object it commends itself to all "fair-minded men and contributes essentially to promote the "business interests of the community. But creditors are "quite zealous in seeking preferences; quite as urgent in "demanding them, as debtors are to offer or to yield them; "and the law which aims to prevent that must apply its re- "straints upon both. There is, indeed, greater reason for "applying these restraints to creditors than there is to debt- "ors. The motives which actuate debtors to give prefer- "ences are, almost always, more excusable than those which, "under uniform bankrupt system, induce creditors to demand "them; and it is unjust to visit upon an embarrassed debtor "the penalty for giving a preference, and allowing the press- "ing creditor to escape the penalty for the participation in "the same transaction, for without the concurrence of both "debtor and creditor, a preference is impossible. The pen- "alty to the debtor is the deprivation of his right to a dis- "charge (under the Act of 1867). For him there is no "atonement. The penalty to the creditor should be exclu- "sion from participation in the distribution of the bank- "rupt's estate." Judge DILLON, in writing the opinion in the matter of Richter, *supra*, said *inter alia*, "The cardinal "idea of a bankrupt act is an indiscriminating distribution "of all of the effects of the debtor to all of his creditors.

"This legislation is essentially founded upon the doctrine "that equality is equity. When a debtor finds himself em- "barrassed experience has shown that there arises in his "mind a strong temptation either to conceal his property "or to distribute it as his favor or his enmity or both may "dictate. * * * Recognizing the essential equality of

" right of all the creditors of a common debtor and the duty " of the latter, if he can not pay all in full to pay all " in equal proportions, and the practical impossibility " of accomplishing full and equal distribution without string- " ent provisions, the Bankrupt Act prohibits the debtor " from making and the creditor * * * from accepting " any preference, in money or property, directly or in- " directly, absolutely or conditionally, which contra- " venes the policy or has the effect to defeat the pur- " poses of the act." In *Gibson* v. *Warden* (14 Wall., 249) Mr. Justice MILLER said that the acts mentioned in Section 35 of the Act of 1867 were " not such as were forbidden by " the common law, or generally by the statute of the states. " Nor are they acts which in their essential nature are im- " moral or dishonest. For a man who is insolvent, or ap- " proaching insolvency, to pay a just debt, is not morally " wrong, nor was it forbidden by any law in this country " previous to the Bankrupt Act. And though a preference " of creditors by transfer or assignment of property by an " insolvent may sometimes be given other creditors, it was " not forbidden by the common law and is not forbidden by " many of the states. It is very certain that such a prefer- " ence may consist with the highest obligations of morality " and under the circumstances which anyone can imagine " it may be the dictate of the purest justice in reference to " all concerned. The careful and diligent framers of the " Bankrupt Act were fully aware of all that has been said. " But they were about to frame a system of laws one main " feature of which was to provide for the distribution of " the property of an insolvent among his creditors, and they " adopted wisely, as the general and prevailing rule of dis- " tribution, equality among creditors. But they found that " this general principle could not without hardship be made

"of universal application. When a creditor has obtained "by fair means a lien upon any property of the bankrupt, "that lien ought to be respected. If he had so obtained pay- "ment of the whole or a part of his debt, the payment ought "to stand. These exceptions to the general rule of distri- "bution were, however, liable to be abused, and might be "used to defeat the purposes of the bankrupt law. The "bankrupt, knowing that he must soon be helpless, would "desire to pay or secure favored creditors. They knowing his "liability to pay, and his liability to be called into a bank- "rupt court, would naturally desire to secure themselves at "the expense of other creditors. In this dilemma Congress "said we can not prescribe any rule by which a preference "would be held to be morally right or wrong; and it would "be fatal to the administration of the law of distribution to "permit such a question to be raised. We will therefore "adopt a conventional rule to determine the validity of these "preferences. In all cases where an insolvent pays or se- "cures a creditor to the exclusion of others, and that cred- "itor is aware that he is so when he received it (again it "is to be noted that this is an expression under the Act of "1867) he shall run the risk of the debtor's continuance in "business for four months. If the law which requires equal "distribution is not called into action for four months, the "transaction, if otherwise honest, shall stand; but if by the "debtor himself, or any of his creditors, that law is invoked "within four months, the transaction shall not stand, but "the money or property received by the party shall become "a part of the common fund for distribution." In *Buchanan* v. *Smith* (16 Wall, 277, 301) it was said: "Equal "distribution of the property, *pro rata,* is the main purpose "which the bankrupt act seeks to accomplish." Mr. Justice Field, considering Section 35 of the Act of 1867, applied

the facts of that case, and the meaning of insolvency, intent to prefer and reason to believe, as used in that act, said, in *Toof* v. *Martin* (13 Wall., 40, 51): "The act of Congress "was designed to secure an equal distribution of the prop- "erty of an insolvent debtor among his creditors, and any "transfer made with the view to secure the property or any "part of it, to one, and thus prevent such equal distribution, "is a transfer in fraud of the act." And in *Collins* v. *Gray, supra,* with reference to the intention of the Act of 1867 to disallow preferences given to favored creditors, but not to go further than to avoid such as were given within four months before the filing of the petition, it is said that that bankrupt act aimed "at an equal distribution of all the prop- "erty of a debtor among his creditors, from the time he be- "comes insolvent * * * provided, of course, he be "adjudicated a bankrupt,as was said in *Gibson* v. *Warden, supra.*"

These expressions of the purpose of a bankrupt system being the equal distribution of an insolvent's estate among his creditors are applicable to the Act of 1898.

Interpreted by them the purpose of the act is found to be the considering of an insolvent's estate as a fund in equity for equal distribution *pro rata* among his creditors, if he be adjudged a bankrupt. It is consistent with that purpose to permit preferential payments to be retained by a creditor, not receiving them with knowledge, so long as he asks no part of the fund. But if he comes into court asking distribution he should do equity, and the preference he has received, whether he knew it was intended as such or not, should be treated as part of the fund for distribution; and I am persuaded that Section 57*g*, under that interpretation, better promotes equality among creditors than did the anala-

gous provisions of the Act of 1867, which required surrender as a condition to the right of distribution only from such creditors as received with knowledge.

Under Section 57*c* of the act the proof and allowance of claims are distinct. Strictly, the proof is the sworn statement by which a creditor presents a claim, and it should conform to the requirements of the acts and General Order XXI of the Supreme Court. The allowance of a claim is the judicial action by which it is established in the proceeding and permitted to participate in distribution. This is the chief purpose of the allowance, although claims may, under the act, be allowed conditionally or temporarily for such purposes as participating in choice of trustees, where some question may remain to be determined before they can be allowed for the purpose of distribution. As, for example, a secured claim may be allowed for the apparent amount of the claim over the value of the security, the exact value of such security being left for future determination under the act, before the amount is ascertained for which the claim is to be allowed for the purpose of distribution. From this it is to be seen that the chief purpose of the allowance of the claim, after it has been proved, is to determine the amount at which it shall participate with other claims in the distribution of assets. Therefore, the chief purpose of Section 57*g*, which by its terms prohibits the allowance of a claim to a creditor who has received a preference, unless he shall surrender his preference, is a prohibition of his receiving a distributive share from the assets without the surrender of any preference which he may have received. And the prohibition of allowance without surrender is in effect a prohibition of the distribution upon claims, upon which preferential payments have been made without their surrender by repayment to the trustee, or what in effect works the same

result, the crediting of them upon the distributive share to which the creditors would be entitled, if the preferences had not been made. Such a disposition of the claim produces equality *pro rata,* and equality is equity. It does not interfere with transactions during the four months which were closed, nor with transactions the payments on which exceed the dividend obtainable by distribution in bankruptcy, for those can be recovered back only under section 60*b* and to such a recovery, knowledge or reason to believe the transfer was intended as a preference is necessary.

Supreme Court of the United States.

No. 391.—October Term, 1900.

John T. Pirie, Robert Scott, George Scott, Andrew McLeisch, Samuel C. Pirie, John E. Scott, and James Grassie, Trading as Carson, Pirie, Scott & Company, Appellants, *vs.* The Chicago Title and Trust Company, Trustee. } Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

[May 27, 1901.]

In proceedings in bankruptcy in the matter of Frank Brothers, bankrupts, in the District Court for the Northern District of Illinois, the appellants filed a claim for goods, wares and merchandise, sold and delivered to said bankrupt firm for the sum of $3,093.98. The claim was allowed, and subsequently a dividend of fifteen per cent. was paid thereon.

On the 31st of August, 1899, the appellee, the Chicago Title and Trust Company, filed a petition for a reconsideration of the claim and its rejection on the ground that Carson, Pirie, Scott & Company had within four months prior to the filing of the petition in bankruptcy received from the bankrupts large sums of money as preferences, which preferences had not been surrendered. The recovery of the dividend paid was also prayed for.

To the petition, Carson, Pirie, Scott & Company made the following answer:

"They admit that they have collected in the usual and ordinary course of their business, from said bankrupts, Frank Brothers, within four (4) months prior to the filing of the petition in bankruptcy, the sum of one thousand three hundred and thirty-six and $\frac{79}{100}$ dollars ($1,336.79).

"Further answering, Carson, Pirie, Scott & Company say, that they did not know, or have reason to believe, that the said Frank Brothers were insolvent at the time the payments were made, nor did they have reasonable cause to believe that such payments were made with any intent to give them a preference, nor did said Frank Brothers intend the payments so made to be preferences."

The matter came up before Frank L. Wren, referee, and he substantially found the facts, from the stipulation of the parties, as hereinafter stated in the findings of the Circuit Court of Appeals, and that the payments constituted a preference. He adjudged therefore that the claim be reconsidered and rejected, and the dividend paid thereon be given up. On review the District Court also found the facts as the referee found them, and on the 9th of May, 1900, made and entered an order, the conclusion of which was as follows:

"It is therefore ordered, adjudged and decreed that said claim of said Carson, Pirie, Scott & Company, heretofore filed herein and allowed, should be reconsidered.

"That said claim of Carson, Pirie, Scott & Company should be rejected and expunged.

"That said Carson, Pirie, Scott & Company forthwith pay to the trustee herein the amount of the dividend heretofore paid to them by the trustee herein, to wit, the sum of $464.10."

Carson & Company excepted, and subsequently took an appeal to the Circuit Court of Appeals, which court affirmed the order of the District Court, upon its opinion in *Columbus Electric Co.* v. *Worden, Trustee, in re Fort Wayne Electric Corporation*, (99 Fed. Rep. 400.) The case was then brought here.

The findings and fact and conclusions of law of the Circuit Court of Appeals are as follows:

"First. That on February 11, 1899, August Frank, Joseph Frank and Louis Frank, trading as Frank Brothers, were duly adjudged bankrupts.

"Second. That for a long time prior thereto appellants carried on dealings with the said bankrupt firm—said dealings consisting of a sale by said appellants to said Frank Brothers of goods, wares and merchandise amounting to the total sum of $4,403.77.

"Third. That said appellants in the regular and ordinary course of business, and within four months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares and merchandise so sold and delivered to said Frank Brothers, the sum of $1,336.79, leaving a balance due, owing and unpaid, amounting to $3,093.98.

"Fourth. That at the time this payment was made said Frank Brothers were wholly and hopelessly insolvent to the knowledge of said Frank Brothers, and that when said payments were made and at the time of the adjudication in bankruptcy of the bankrupts herein, the assets of said bankrupts did not exceed the sum of $125,000, while their liabilities exceeded $500,000.

"Fifth. That at the time of the payment above set forth neither said appellants nor any of their agents had knowledge of the insolvency of said Frank Brothers, or had reasonable cause to believe that said Frank Brothers were insolvent, and that when said payment was made said appellants did not have reasonable cause to believe that said bankrupts by said payment intended thereby to give a preference. Nor did said bankrupts by said payments intend thereby to give a preference.

"Sixth. That at or about the time of the first meeting of the creditors herein, to wit, on March 17, 1899, said appellants duly filed a claim herein against said bankrupts' estate for their balance of said claim for goods, wares and merchandise sold by them to the bankrupts, as aforesaid—said balance amounting to the sum of $3,093.98, and that at or about the time of the said first meeting of creditors herein said claim was duly allowed at the sum last above set forth; that thereafter, and on the 28th day of April, 1899, a dividend of 15 per cent. upon all claims which were allowed against said bankrupts' estate was duly declared by the referee herein, and that said dividend was paid to the various creditors who had proved

their claims, including appellants'; that the amount of the dividend paid to appellants was $464.10, which money appellants still retain, no part thereof having been repaid or returned to the trustee herein or anybody acting on behalf of said trustee.

"Seventh. That at the time of the allowance of said claim and the declaration of said dividend and the payment thereof, the trustee was not aware of the fact that said appellants had received any preference on their claim and demand against said bankrupts.

"Eighth. The said appellants have refused to surrender to the trustee the amount of the payment made to them by said bankrupts above set forth as a condition of the allowance of their said claim, and have by their counsel declared that it is the intention of said claimants to retain the full amount of said payment so made to them by said bankrupts, and not to surrender the same.

"Ninth. That the appellee, Chicago Title and Trust Company, trustee, which had been duly appointed trustee of the bankrupt estate of said Frank Brothers, filed its petition praying that the claim of appellants against the bankrupts' estate be reconsidered and rejected, and that said appellants be ordered and required to repay to the trustee the amount of the dividend on the said claims theretofore paid to appellants, the grounds of said petition being that said appellants had within four months prior to the adjudication in bankruptcy of said bankrupts received large sums of money as preferences, which preferences said appellants had not surrendered; that said appellants appeared in said proceedings and answered said petition.

"That the referee upon the evidence presented before him decided that the said payment made by the bankrupts to said appellants constituted a preference, and that by reason of said preferences the appellants' claim should be reconsidered and rejected, and that appellants should repay to appellee the amount of the dividend on appellants' said claim theretofore paid by appellee to them the sum of $464.10; that upon appellants' application and upon the certification of the questions presented to the United States District Court for the Northern District of Illinois, the decree of the referee was confirmed, and an order in the District Court was entered in accordance with the referee's said report, from which order an appeal was taken to this court.

"Upon the foregoing facts this court makes the following conclusions of law:

"First. That the payment made by appellants to the bankrupts at the time and in the manner above shown constitutes a preference, and that by reason of the failure and refusal of said appellants to surrender said preferences they were not entitled to prove their claim against the bankrupts' estate.

"Second. That the District Court had the power and authority to order, require and compel appellants to repay to the trustee the amount of the dividend received by appellants."

After stating the case as above, Mr. Justice McKenna delivered the opinion of the Court.

The question presented by this record is whether payments in money made by an insolvent debtor to a creditor, the debtor not intending to give a

preference, and the creditor not having reasonable cause to believe a preference was intended, did nevertheless constitute a preference within the meaning of the bankrupt act of 1898, and were required to be surrendered as a condition of proving the balance of the debt or other claims of the creditor.

The solution of the question depends primarily upon the interpretation of subdivisions "*a*" and "*b*," section 60, of the law of 1898, and certain related sections. Subdivision "*a*" of section 60 is as follows:

"Preferred Creditors.—*a.* A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by "transfers of property," payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in section 1. It is there provided that "'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolute or conditional, as a payment, pledge, mortgage, gift or security." It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value—anything which has debt paying or debt securing power.

We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it. It would be very strange indeed if such forms of property, with all their sanctions and powers, should be excluded from the statute, and the representatives of private debts which we denominate by the general term "securities" should be included. We certainly cannot so declare upon one meaning of the word "transfer." If the word itself permitted such declaration, which we do not admit, the definition in the statute forbids it. "Transfer" is defined to be not only the sale of property, but "every other mode of disposing or parting with

property." All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished—a preference enabling a creditor "to obtain a greater percentage of his debt than any other creditors of the same class."

But it is said "that Congress in passing the law had in mind the distinction between the payments of money and the transferring of property; otherwise they indulged in tautology" in subdivision *d*. By that it is provided: "If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, *pay money* or *transfer property* to an attorney and counsellor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

That all the words of a statute should, if possible, be given effect we concede, but tautology sometimes occurs. Is there not an example in subdivision *e* of section 67 (which, by the way, and notwithstanding, is relied on by the appellants)? It provides that "all conveyances, *transfers*, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt," in fraud of creditors, shall be null and void as to them.

Manifest tautology, but certainly not used to detract from the definition of "transfer" in section 1, or to exclude application of that section in proper cases. Conveyances, assignments and incumbrances of property are but modes of its absolute or conditional disposition (transfer), as payment of money is a mode of its disposition (transfer), and there was a particular expression of each mode on account of the primary purpose to be secured in each case—the purpose being, in 60 (*d*), to control payments to attorneys; in 67 (*e*), the purpose being to prohibit the disposition of property by the debtor to persons other than creditors in fraud of the act.

But, construing transfers of property to include payments of money, it is nevertheless urged, that not only must the act and state of mind of the giving debtor be considered, but the act and state of mind of the receiving creditor must be considered. It is not enough that an advantage in fact be given, but to make it a preference "the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended, thereby to give a preference." In other words, it is contended that the quoted words should be read into subdivision (*a*) from subdivision (*b*), and the necessity of doing so is

claimed to be established by other sections of the statute. The other sections are inserted in the margin.*

Section 60 (*b*) is as follows:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Subdivisions (*a*) and (*b*) are concerned with a preference given by a debtor to his creditor. Subdivision (*a*) defines what shall constitute it, and subdivision (*b*) states a consequence of it—gives a remedy against it.

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*SEC. 60 *c*. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

SEC. 3. Acts of Bankruptcy.—*a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors.

SEC. 3 *b*. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

SEC. 67 *d*. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

SEC. 68. Set-offs and Counter Claims.—*a*. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated, and one debt shall be set-off against the other, and the balance only shall be allowed or paid.

b. A set-off or counter claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

The former defines it to be a transfer of property which will enable him to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that the transfer may be avoided by the trustee and the property or its value recovered, provided, however, that the preference was given four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended. So far, so clear. If the conditions mentioned exist, the preference may be avoided. But if the person receiving the preference did not have cause to believe it was intended, what then? It follows that the condition being absent, its effect will be absent. In other words, he may keep the property transferred to him, whether it be a complete or partial discharge of his debt. But if only a partial discharge, may he prove the balance of his debt or other debts?

Section 57 (*g*) provides for such case. "The claims of creditors," it provides, "who have received preferences shall not be allowed unless such creditors have surrendered their preferences."

There is certainly no ambiguity so far. What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back. If not so taken, it may be kept or surrendered. Unless surrendered, he who received it cannot prove his debt or other debts. His election is between keeping the preference and surrendering it. That is the favor of the law to his innocence, but, aiming to secure equality between him and other creditors, can the law indulge farther? He may have been paid something—maybe a greater percentage than other creditors can be. That is his advantage, and he may keep it. If paid a less percentage he can obtain as much as other creditors by surrendering the payment, and an equality of distribution of the assets of the bankrupt is assured. The effect is equitable, and that it was intended is supported by prior legislation.

The bankrupt act of 1867 had provisions against preferences. (Secs. 23 and 35; secs. 5804 and 5128, R. S.) They could be recovered and had to be surrendered to enable the creditor to prove his debt, but the law was careful to express upon what condition in each case. They could be recovered back if the creditor had "reasonable cause to believe" the debtor was insolvent, and they were given "in fraud of the provisions of the act." (Sec. 5128, R. S.) They had to be surrendered if received under like condition. Section 5084, R. S., provided that "any person who . . . has accepted any preference *having reasonable cause to believe that the same was made or given by the debtor* contrary to any provision of the act, March 2, 1869, chap. 176, . . . shall not prove the debt or claim on account of which the preference is given, nor shall he receive any dividend therefrom until he shall first surrender to the

assignee the property, money, benefit or advantage received by him under such preference."

The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued usually its words are, and an omission of the words imply an omission of the purpose. This rule we lately applied in *Bardes* v. *First National Bank of Hawarden*, (178 U. S. 524.) In that case, in determining whether the jurisdiction of the Circuit and District Courts of the United States was concurrent with the State courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841 and 1867 were compared with that of 1898, and from the omission from the latter of certain provisions of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

We might rest the discussion here, but counsel have ably urged against our interpretation of the statute considerations which should be noticed. They assert its incorrectness because: (1) That the provisions of 57 (*g*) which denies allowance to the claims of creditors unless such creditors surrender the preferences they have received, are penal and should be strictly construed. Being penal, it is contended, there should be a guilty intent to incur their punishment. (2) Of the defectiveness of 60 (*a*) and the necessity of explaining it and enlarging it by other provisions. (3) Of the consequences of the construction—consequences which are declared to be anomalous and even absurd.

1. We cannot concur in the view that 57 (*g*) is a penal requirement. It is hardly necessary to assert that the object of a bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt—not among some of the crditors, but among all of them. Such object could not be secured if there were no provisions against preferences—no provisions for defeating their purpose. And it is no reflection on the statute that it does not do so entirely. It allows complete payments, and counsel has seen and urges what seems to be inequitable in that—the giving favor to the diligence which secured it, and strongly argues that if complete payments may be retained without

penalty, why not partial payments; if diligence (and diligence is made a great deal of in the argument) is favored in the one case, why not in the other? The view is too narrow and partial. Comparing such creditors, there may be inequality, but, considering other creditors, what shall be said? Some thought must be had of them, and considering them—indulgent creditors as well as diligent creditors—an attempt to secure the best remedies and results in the circumstances was, no doubt, the aim of the legislature. And advantage may be left with the preferred creditor. As we have already said, if the preference exceed the share of the bankrupt's estate which the creditor would be entitled to, he may keep the preference. If it be less, he may surrender it and share equally with the other creditors. If the purposes of the statute are to be considered, this is certainly not punishment but benefit. If it is discrimination at all, it is discrimination against the other creditors.

2. Undoubtedly all the sections of the act must be construed together as means to effect its purpose, and some of its sections are closely related. It does not follow, however, that each section should not be given the meaning its language conveys, if clear and consistent. It does not follow that because the terms of a section are defined elsewhere or the consequences of its provisions are expressed elsewhere that it becomes a nullity or that it is defective. Not that we may not "travel outside," to use counsel's expression, of any section if it be necessary to travel outside. We may travel outside for some things, not necessarily for all things. The argument is, you must travel outside of subdivision (*a*) for a time within which the preference must have been given, and four months are selected in analogy to subdivision (*b*) and of section 3 (*b*). This may be conceded, and the meaning of subdivision (*a*) would not be otherwise altered. There would still remain a clear definition of a preference.

The argument is strong which is urged to support a four months' limitation, but it can be argued in opposition that subdivision (*a*) needs no explanation from other parts of the statute "in order to obtain a time limit on the question of preference." It can be argued that subdivision (*a*) gives such limit in the existence of insolvency. But we are not required to decide either way on this record. A time limit is entirely independent of the belief of the creditor or of the belief which may be attributed to him—entirely independent of his right to a greater proportion of the bankrupt's property than other creditors. It is urged, however, that a time limit—whether of four months or extending indefinitely before the filing of the petition in bankruptcy having no limit but the statute of limitations—differently affects the creditor receiving the preference, and the difference should be considered in construing the statute. It is pointed out that insolvency has a different meaning under the act of 1898 than it had

under the act of 1867. Under the latter, the debtor was insolvent when he was unable to pay his debts in the ordinary course of business. Under the former, when the aggregate of his property at a fair valuation is insufficient to pay his debts, and, it is said, this being practically impossible to ascertain on account of the uncertainty of its factors, therefore a time limit to a preference is necessary, and also that there should be a guilty knowledge on the part of the creditor of the guilty intent upon the part of the debtor. There are two weaknesses in the argument. It ascribes a penal character to section 57 (*g*), and regards the requirement of the surrender of the preference as a condition of proving debts as a punishment and not a provision to secure equality among creditors. On this we have sufficiently commented. The other weakness in the argument is that it exaggerates the difference between the definitions of insolvency and overlooks an advantage to the creditor in the definition contained in the act of 1898. Inability to pay debts in the ordinary course of business usually accompanies an insufficiency of assets. It may not, of course. At times a debtor's property, though amply sufficient in value to discharge all of his obligations, may not be convertible without sacrifice into that form by which payments may be made. The law regards that possibility. In this there is indulgence to the debtor, and through him to preferred creditors. But the discussion need not be extended. The law has made its definition of insolvency, whatever the effect may be, and has determined by that definition consequences not only to the debtor but to his creditors and to purchasers of his property.

3. It is but one rule of construction that the consequences of a statute may be considered in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by that one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors. It is not contended that the provisions which we are considering are not clearly expressed and adequate to convey a definite meaning. It is true, it is urged that the word preference imports the conscious participation of the creditor and debtor in the same intent. We cannot concur in that view, and we are brought to the consequences of the construction which we have put upon section 60. It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation the contradiction of the reason which grows out of the subject matter of the legislation and the purpose of the legislators. But all legislation is not simple nor its consequences obvious or to be controlled, even if obvious. Whether there should be any legislation at all and its extent and form may be matters of dispute. Its consequences may be viewed with favor or with alarm; some regretted but accepted as inevitable—accepted as the shadow side of the good. In

such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed, and considered as overbalanced by the particular advantages the act was calculated to produce. (*United States* v. *Fisher*, 2 Cranch, 389.) Therefore the sound rule expressed in *Sturgis* v. *Crowninshield*, (4 Wheat. 202): "It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But, if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

So in *United States* v. *Goldenberg*, (168 U. S. 103,) where Mr. Justice Brewer, answering the argument based on the consequences of an act of Congress against the meaning expressed by its words, said:

"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense, (*Holy Trinity Church* v. *United States*, 143 U. S. 457); it involves no injustice, oppression or absurdity, (*United States* v. *Kirby*, 7 Wall. 482; *McKee* v. *United States*, 164 U. S. 287); there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payment by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally, with protest, follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them."

Let us apply these principles to the present case. The consequences of the construction of the Circuit Court of Appeals is said to be that it will "harass and embarrass the business of the country," and the specification is that any payment to a creditor may become a preference and the alternative forced upon him of giving it up or losing the right to prove his claim or claims against his debtor's estate. That consequence does not seem to us very formidable even in the instance of payments to private bankers by their depositors as illustrated by counsel or, as also illustrated

if the payments should be distributed as gifts to relatives, or to endow universities, and cannot be obtained to be surrendered. Granting that such situation may be produced, is it anything after all but putting the creditor to an election of comparative and debatable courses where some loss must occur, whichever be taken? Business life has many such examples, and a law which has that consequence in seeking equality among creditors is certainly not absurd in even the loosest and most inconsiderate meanings of the word. Other illustrations are used which present the same situation or depend upon it—that is, the election which a preferred creditor is forced to make in order to prove his debts. A trader is insolvent and owes $100,000. His assets are $75,000. He owes $50,000 to A and B; the other $50,000 to other letters of the alphabet. He makes payments to the latter in order to prefer them, and then goes into bankruptcy. A and B having nonpreferred, hence provable claims, elect a trustee. What of the other creditors? Counsel having full control of the imaginary situation makes them ignorant of the debtor's affairs, and therefore unwilling to risk a division with A and B. That it is possible for such ignorance and doubt to exist may be conceded, but it does not occur to us how either can reasonably continue for the time debts may be proved against the estate under the disclosures required of the bankrupt by the statute, and the information obtained by the trustee of the estate in its administration.

But it is said a debtor may even make money by going into voluntary bankruptcy, and the result is worked out by circumstances carefully imagined to that end, combined with, as absolutely necessary to the result, the ignorance and timidity of creditors. The illustration is that, suppose a bankrupt has made partial payments to every one of his creditors within four months preceding bankruptcy; that his assets at the time of the filing of the petition amounted to $50,000, and his liabilities to $100,000. Hesitating in this extraordinary situation to surrender their payments—no creditor being tempted by $50,000—the conclusion is confidently advanced that "if the construction of the court below is sound, there are no creditors who have provable claims against the bankrupt." And the query is put, who gets the $50,000? The implied answer is, that the bankrupt gets them, and the result is easily pronounced absurd. It is an absurdity which the "construction of the court below" is not responsible for. What a court would do with such a scheme as a fraud upon the act, we are not called upon to say. We may well doubt if a scheme of that kind will ever come up for decision. We find it impossible to conceive a case in which $50,000, or, indeed, any surplus, would not be an inducement to some creditor to add it, or some portion of it, to the payment of his claim.

It is further contended "that to constitute a preference under the bankruptcy act within either 57 (*g*) or 60 (*a*), at least *the intent on the part of*

the bankrupt to prefer must be present." In support of this it is said that an act of bankruptcy consists under section 3 (2) of a transfer by a debtor while insolvent of any portion of his property to one or more of his creditors, *with intent to* prefer such creditors over other creditors, and in such case a petition in involuntary insolvency may be filed against him. (Section 3 *b*.) It is hence deduced, reading those provisions with section 60 (*a*), that preferences under the latter must be taken with the intent declared in the former, because it is not reasonable to assume that Congress intended that there could be preferences which were not acts of bankruptcy. The claim overlooks the fact that the language of section 3 (2) implies a difference between a preference and the intent with which it is given, and besides confounds the different purposes of the sections and their different conditions. It was for Congress to decide whether the consequences to a debtor of being forced into bankruptcy so far transcended the consequences to a creditor by a surrender of his preference, as to make the former depend upon an intent to offend the provision of the statute and the latter not so depend. And we see nothing unreasonable in the distinction or purpose. Nor does the contention of appellants find support in the provisions of the act of 1867, and the cases of *Mays* v. *Fulton*, 20 Wall. 414,) and *Wilson* v. *City Bank*, (14 Wall. 473.) In that act there was a careful expression of the intent of the debtor (section 5021 R. S.) and as careful an expression of the state of mind of the preferred creditor. (Secs. 5084, 5128.)

Nor again do we find anything which militates against our conclusion in subdivision "*c*" of section 60. That subdivision is applicable to the cases arising under "*b*," and allows a set-off which otherwise might not be allowed.

The interpretation of the statute which we have given has also been given by the Circuit Court of Appeals of the Ninth Circuit, in a well considered opinion by Circuit Judge Morrow, in the matter of *Fixen, Bankrupt*, (102 Fed. Rep. 295.)

The second assignment of error is that the court erred in compelling the appellants to repay the amount of dividends received by them. Error is asserted because of the provision of subdivision "*b*" of section 23. The whole section is as follows:

"Jurisdiction of the United States and State Courts—*a*. The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"*b*. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such

trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant.

"c. The United States courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

The proceedings we are reviewing were not a suit within the meaning of that section, and the order of the court requiring the repayment of the dividend was properly and legally made.

Judgment affirmed.

The CHIEF JUSTICE, Mr. Justice SHIRAS, Mr. Justice WHITE and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court, U. S.